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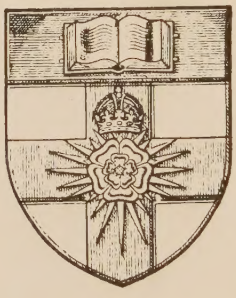

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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

BENNETT *v.* WHITE.

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April 8.

Practice—Set-off—Mutual Debts—Assignment to Defendant of Debt owed by Plaintiff to Third Person—Set off by Defendant of assigned Debt against Debt claimed from him by Plaintiff—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.

In an action to recover a debt due from the defendant to the plaintiff, the defendant cannot set off a debt originally due from the plaintiff to a third person who has assigned it to the defendant.

APPEAL from a judgment of the Recorder sitting at the Mayor's Court, London.

The action was brought in the Mayor's Court on May 17, 1909, to recover the sum of 31*l.* for money payable by the defendant White to the plaintiff for work done (printing) and materials provided by the plaintiff for the defendant at his request.

The debt sued for was not disputed by the defendant, but it appeared that the plaintiff on May 5, 1909, was indebted to one Burton in the sum of 31*l.* for commission due to Burton.

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By a deed of assignment dated May 5, 1909, Burton assigned the debt of 31*l.* to the defendant absolutely, and notice in writing of the assignment was given to the plaintiff on the same day. By his amended plea the defendant (inter alia) claimed to set off the debt of 31*l.* so assigned to him against the plaintiff's claim.

The Recorder held that the debt assigned to the defendant could not be the subject of a set-off, and gave judgment for the plaintiff for 31*l.* The defendant appealed.

J. P. Valetta, for the defendant. Immediately the assignment of the debt was made by Burton to the defendant there were mutual debts between the plaintiff and the defendant within the meaning of the Statutes of Set-off (2 Geo. 2, c. 22, and 8 Geo. 2, c. 24). (1) The Statutes of Set-off were repealed as to the Supreme Court of Judicature in England by the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59), and generally by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49) (with the reservation contained in s. 7), and replaced by the Supreme Court of Judicature Act, 1873, s. 24, sub-s. 3, and Order XIX., r. 3, but the principles upon which set-off was allowed under the Statutes of Set-off have not been altered by the subsequent legislation. The term "mutual debts" means debts owing by the parties to each other in the same capacity. Those debts are the subject of set-off: *Bankes* v. *Jarvis* (2); *In re Molesworth*. (3) The effect of the assignment was by virtue of s. 25, sub-s. 6, of the Supreme

(1) 2 Geo. 2, c. 22, s. 13: "Where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other . . . ."

8 Geo. 2, c. 24, s. 5: "Mutual debts may be set against each other . . . . notwithstanding that such debts are deemed in law to be of a different nature; unless in cases where either of the said debts shall accrue by reason of a penalty contained in any bond or specialty," in which case "the debt intended to be set off shall be pleaded in bar, in which plea shall be shown how much is truly and justly due on either side; and in case the plaintiff shall recover in any such action or suit, judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff, after one debt being set against the other as aforesaid."

(2) [1903] 1 K. B. 549.

(3) (1907) 51 Sol. J. 653.

Court of Judicature Act, 1873, to give to the defendant "all legal and other remedies" for the assigned debt. The defendant could have sued the plaintiff on the assignment, and it would be defeating the object of the Act of 1873 if it were held that the remedy by way of set-off did not exist.

Hon. E. A. Harney, for the plaintiff. The expression "mutual debts" in the Statutes of Set-off means debts which were in their origin debts between the parties, and the object of the Statutes of Set-off was to enable the party sued to deduct money due to him from the party by whom he was sued. But the right does not extend to a debt which was originally due to a third party. In the present case the plaintiff might have a cross-claim against Burton. But if the defendant is allowed to set off the assigned debt against the plaintiff, the plaintiff will be deprived of his right of shewing that Burton owes him money: *Rees* v. *Watts* (1); *Young* v. *Kitchin*. (2) Mutuality in the Statutes of Set-off has reference to the origin of the debts, not to the condition of the indebtedness of the parties at the time the matter comes into Court. The fact that the Statutes of Set-off expressly provide that executors and administrators may set off a debt which existed between the testator or intestate and the other party shews that with that exception the debts must in their origin be between the parties in the same right in order to be mutuat debts which are the subject of set-off. Sect. 25, sub-s. 6, of the Supreme Court of Judicature Act, 1873, did not enlarge rights. It merely enabled an assignee to do in his own name that which previously had to be done in the name of the assignor.

J. P. Valetta in reply. If the plaintiff had a cross-claim against Burton, it would be an "opposing or conflicting" claim within the meaning of the proviso to s. 25, sub-s. 6, of the Supreme Court of Judicature Act, 1873, and immediately the plaintiff had notice of the assignment he could have refused to accept the position and have called upon the parties to interplead, and could then have set up his cross-claim against Burton.

DARLING J. This case raises a point of novelty and difficulty. The facts are that the plaintiff sues the defendant for 31*l.* and

(1) (1855) 11 Ex. 410. (2) (1878) 3 Ex. D. 127.

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it is clear that he is entitled to recover that sum from the defendant. Thereupon the defendant asks to be allowed to set off against the debt of 31*l.* which he owes the plaintiff a debt due from the plaintiff to the defendant. It is due from the plaintiff to the defendant because the plaintiff owed a sum of money to one Burton and Burton assigned that debt to the defendant. It is agreed that that assignment was effectively and legally made, and, that being the case, there undoubtedly is a debt due from the defendant to the plaintiff and also one due from the plaintiff to the defendant. The question now is, can the debt due from the plaintiff to the defendant be set off against the debt due from the defendant to the plaintiff? On behalf of the defendant it is contended that it can upon the ground that the debts are mutual debts within the meaning of the Statutes of Set-off. It is difficult to say exactly what is meant by mutual debts in those statutes. It is quite true that two persons who have had transactions resulting sometimes in a debt being due by one to the other and sometimes in there being a balance the other way may be called mutual debtors or mutual creditors, because, whether one looks at one party to the account or the other, each in turn is a creditor or a debtor. But it seems an unscientific use of language to speak of a debt as a mutual debt. It cannot sometimes be a debt and sometimes not. The balance between two persons, if there are cross-debts between them, could never be a mutual debt, because after the balance is ascertained it must always be a debt one way or the other. A debt is always a debt and not at one time a debt and at another time a credit. A mutual debt ought to be one which is sometimes a debt and sometimes a credit, which is impossible. I think that the language of the Statutes of Set-off is not so accurate as that of an Act of Parliament ought to be, nor am I the first judge who has taken this view or expressed it, for in *Rees* v. *Watts* (1) Coleridge J. said, "The expressions are not very happily chosen, but the meaning seems to us very clear." It is because the meaning seems to be clear although the language is not happily chosen that I have mentioned that in the present case there was a real debt due from the defendant

(1) 11 Ex. 410.

to the plaintiff, and that as the result of the assignment to the defendant of the debt the plaintiff originally owed to Burton there was also a real debt due from the plaintiff to the defendant. The question now arises whether those debts are mutual debts within the meaning of the Statutes of Set-off. The statute 2 Geo. 2, c. 22, s. 13, says that "Where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other." The only light which is thrown upon the meaning of the words "mutual debts" is, I think, to be found in 8 Geo. 2, c. 24, s. 5. There it is said "Mutual debts may be set against each other . . . . notwithstanding that such debts are deemed in law to be of a different nature." I do not think the debts in this case were of a different nature within the meaning of those words. One was a debt for the price of printing done by the plaintiff for the defendant, and the other was a debt due from the plaintiff to Burton in respect of commission due to Burton. I think that the statute 8 Geo. 2, c. 24, means by debts of a different nature debts which arise in a totally different way, e.g., where one debt arises under a simple contract and the other under a bond. I think the Statutes of Set-off meant by mutual debts that where between the same parties an account could be taken and all their transactions inquired into so as to exhaust the matter and strike a balance, the one who could shew a balance in his favour out of the whole of the transactions was entitled to judgment, and if it was the plaintiff he was entitled to judgment for that balance; but if it once appeared that out of the whole transactions there was a balance in favour of the defendant or that the plaintiff was indebted to him in an amount equal to the plaintiff's claim the Court could give judgment for the defendant. The Supreme Court of Judicature Act, 1873, s. 25, sub-s. 6, provides that "any absolute assignment, by writing under the hand of the assignor . . . . of any debt . . . . of which express notice in writing shall have been given to the debtor . . . . shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act

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had not passed,) to pass and transfer the legal right to such debt . . . . from the date of such notice, and all legal and other remedies for the same . . . . " The remedies for the debt mentioned in that section seem to me to be the remedies for the recovery of the debt. The section does not say that a person shall be at liberty to set it off. No doubt if there happens to be a cross-account a person does in a sense recover his debt if the debt is the same in amount as that which he owes. But if a plaintiff owed the defendant 100*l.* and the defendant owed the plaintiff 50*l.* and the defendant set off the debt due to him against the debt due by him to the plaintiff he would not in strictness recover his debt from the plaintiff; he would not pay the plaintiff anything, because his own credit against the plaintiff exceeded the amount of the debt owed by him. The debts would still be due although if the defendant sued the plaintiff the defendant could not recover from the plaintiff the whole sum due to him. If in considering the meaning of the words "mutual debts" regard were had to the words of the statutes only, I think this set-off would have to be allowed. But it is necessary not only to look at the words of the statutes, but also at the intention of the Legislature, and that intention, as I gather from the statutes and decisions upon them, was to deal with the simple case of debts between the same parties being in their origin between those parties, or at the very outside having an origin as to one party in the case of a testator who had died and was replaced by an executor or administrator. If in the present case the defendant is right, then the following result might happen. Suppose two merchants had cross-dealings with each other, the one buying goods from the other, it would be possible for one of them to whom a sum of money was due for some specific article to pick out that article from among the different transactions between the parties and assign the debt due in respect of it to a third person; and if that third person was being sued by the merchant who owed the debt in respect of the specific article he might set off the assigned debt, and if it was equal in amount to the sum for which he was being sued he might contend that he owed nothing. The result would be that the person against whose claim the

set-off was set up would be shut out from all the remedies he might have had against the assignor of the debt. The consequence might be that a person against whom there might be a real balance on an account could merely by picking out one specific debt due to himself and assigning it to some one else deprive the person in whose favour as regards himself the balance of account really lay of the remedies he might have against the person who had assigned the debt. I do not think the Legislature intended to make such a thing possible. In my opinion, by the very inapposite words "mutual debts" it was not intended to allow a debt obtained by assignment to be set off against a debt which had its origin between the immediate plaintiff and defendant in the action. For these reasons I think this appeal must be dismissed.

I do not think that the proviso to s. 25, sub-s. 6, of the Supreme Court of Judicature Act, 1873, deals with the point made by counsel on behalf of the defendant. It deals with opposing or conflicting claims to the debt which is the subject-matter of the assignment. I do not think that the words of the proviso adequately describe a claim by the original debtor to be called upon to meet only the claim of the original creditor.

BUCKNILL J. I agree. The question in this case arises under s. 25, sub-s. 6, of the Supreme Court of Judicature Act, 1873. That sub-section relates to procedure and nothing else. It does not alter legal rights or make that a mutual debt which was not so before. The section gives a legal right to a debt assigned in accordance with the provisions of the section. In respect of what kind of debt does it give a legal right? Does it mean that there is to be a mutual debt between A. and B. when a third party C. is introduced? I think not. The mutuality in the present case in regard to the debt was mutuality existing between Burton and his debtor, the plaintiff. The sub-section gives Burton the right to assign all his rights and remedies with regard to that debt to the defendant, but no case has been cited to us in which it has been decided that where a debt due to the assignor is assigned by him, the assignee can

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when sued by his original creditor set off the debt assigned to him. We must look back further and see what was the origin of allowing a set-off. The origin is statutory. The statute 2 Geo. 2, c. 22, s. 13, says that "Where there are mutual debts between the plaintiff and defendant . . . . one debt may be set against the other." Mutuality was the keynote of that provision, and in my opinion, although the question is a difficult one, the Supreme Court of Judicature Act, 1873, has not gone further than the original Statutes of Set-off did. It only gave to the assignee of a debt the right to make the same use of the debt assigned as the assignor might have made. So in the present case, after Burton, to whom the plaintiff owed a debt, assigned the debt to the defendant, the latter could sue the plaintiff for the amount, or when sued by the plaintiff could counterclaim against him for it. It is quite a different thing to say that the defendant is entitled to set off the debt when sued by the plaintiff on the ground that the debt when assigned by Burton to the defendant becomes a mutual debt between the plaintiff and the defendant. There is no mutuality between the plaintiff and the defendant. But there are other reasons why the set-off should not be allowed. The assignee of the debt might find himself in a much better position in regard to the assigned debt than the assignor would be, because it might be that the assignor of the debt might not on the total transactions be owed anything by, but might on the contrary be a debtor to, the person against whose claim the assignee set off the particular debt assigned. In my opinion that could not have been intended. The whole matter is kept within proper limits by allowing the assignee to sue for the debt, and I am of opinion that it was not intended by the Supreme Court of Judicature Act, 1873, to put the assignee in a better position than the assignor might himself have occupied. I therefore think that the position as between the plaintiff and defendant is that the defendant could counterclaim against the plaintiff in respect of the debt assigned by Burton, but that he has no right of set-off. With regard to the proviso contained in s. 25, sub-s. 6, of the Supreme Court of Judicature Act, 1873, I think that it means that where there has been an alleged assignment of a debt, but a claim is made

in opposition to or in conflict with the alleged assignment, the debtor may interplead.

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Appeal dismissed.

Solicitors for plaintiff: *Moeran & Co.*
Solicitor for defendant: *M. Perkins.*

J. E. A.

SELDON *v.* WILDE.

1910
April 12.

Practice—Chancery Division—Solicitor—Costs—Taxation—Delivery of Bill of Costs—Default—Motion for Attachment—Order for Payment of Costs of Motion—Enforcement—Action in King's Bench Division—Rules of the Supreme Court, Order XLII., *r.* 24.

An order was made by a judge in the Chancery Division that the defendant, a solicitor, should pay to the plaintiff the costs of a motion by the plaintiff for the attachment of the defendant for contempt of Court in not having delivered to the plaintiff a bill of costs pursuant to an order for taxation of costs. The costs of the motion having been taxed, the plaintiff sued the defendant in the King's Bench Division to recover the amount thereof:—

Held, that the action was maintainable.

ACTION tried by Darling J. without a jury.

The plaintiff and the defendant were solicitors. On July 28, 1909, the plaintiff obtained in the Chancery Division an order for taxation of the defendant's bills of costs as agent for the plaintiff. The order, which was in the common form, directed the delivery of a bill of costs by the defendant to the plaintiff. The defendant made default in delivering to the plaintiff his bills of costs pursuant to the said order, and the plaintiff thereupon gave notice of motion in the Chancery Division for the attachment of the defendant for contempt of Court. The defendant gave notice of motion to set aside the order of July 28. The two motions were heard together by Neville J., who on November 12, 1909, made the following order: "In the High Court of Justice, Chancery Division. Mr. Justice Swinfen Eady. In the matter of William Wilde one of the solicitors of the Supreme Court. (Taxation of Costs.) Upon motion this day made unto

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this Court by counsel for Arthur Frederick Seldon of Barnstaple in the county of Devon solicitor that he might be at liberty to issue a writ or writs of attachment against the above-named William Wilde for his contempt of this Court in making default in delivering to the petitioner Arthur Frederick Seldon a bill of fees and disbursements in all suits causes actions and other matters of business in which he had been employed as the agent for the petitioner Arthur Frederick Seldon pursuant to the order in this matter dated July 28, 1909, and upon motion this day also made unto this Court by counsel for the above-named William Wilde that the said order dated July 28, 1909, might be discharged and upon reading the said order dated July 28, 1909, ... This Court doth not think fit to make any order upon the motion of the said solicitor William Wilde and it is ordered that the said William Wilde do on or before December 3, 1909, deliver to the said Arthur Frederick Seldon his bill of fees and disbursements pursuant to the said order and it is hereby referred to the taxing Master to tax the costs of the said Arthur Frederick Seldon of both the said motions and it is ordered that the said William Wilde do pay to the said Arthur Frederick Seldon the amount of his said costs when taxed."

The plaintiff's costs were taxed at 123*l.* 18*s.*, and the plaintiff brought this action to recover that sum from the defendant.

The defendant by his defence alleged that the statement of claim disclosed no cause of action and that the action was an abuse of the process of the Court.

R. H. R. Reeve, for the plaintiff. The action is maintainable. The order is one for the payment of a sum of money, and under Order XLII., r. 24, it may be enforced in the same manner as a judgment to the same effect, that is, by action. It is immaterial that the order was made by a judge sitting in the Chancery Division and that the action is brought in the King's Bench Division. In *Norton* v. *Gregory* (1) it was held that an action could be brought in the Queen's Bench Division upon an order for the payment of costs made in the Probate Division. It is true, as was pointed out by Rigby L.J. in *Norton* v. *Gregory* (1),

(1) (1895) 73 L. T. 10.

that there was no right to sue at common law upon a decree of a Court of Equity; but this order is not a decree of a Court of Equity. It is an order which could have been made in either Division of the High Court. [He also referred to *Hodsoll* v. *Baxter* (1) and *In re Boyd.* (2)] It will be said that the order was made in a quasi-criminal proceeding, and that on that ground the action does not lie. The answer is that the proceeding is a purely civil one, originating in the common form order for the taxation of costs. In *Godfrey* v. *George* (3) it was held that an action would lie on an order by which a solicitor was ordered to pay the costs of an application to strike him off the rolls, even though an unsuccessful attempt to attach the solicitor for disobedience to the order had previously been made. That is a far stronger case than the present, for this order for the payment of costs could not be enforced by attachment.

Spencer Bower, *K.C.*, and *Firminger*, for the defendant. This action is not maintainable. First, under Order XLII., r. 24, an order of a Court or a judge may be enforced in the same manner as a judgment to the same effect; and by Order XLII., r. 3, a judgment for the payment of money may be enforced by any of the modes by which a judgment or decree for the payment of money of any Court whose jurisdiction is transferred by the Judicature Act, 1873, might have been enforced at the time of the passing of the Act. Before the Judicature Act a decree of the Court of Chancery could not be enforced by means of an action in the Common Law Courts, the reason being, as was pointed out by Bowen L.J. in *Bailey* v. *Bailey* (4), "that no action will lie upon a decree in equity, because no promise can be implied at common law to pay a mere equitable debt." The use of the words "judgment or decree" in Order XLII., r. 3, shews that it was intended to preserve the distinction which formerly existed in this respect between a decree of the Court of Chancery and a judgment of a Common Law Court. In *Bailey* v. *Bailey* (4) it was held that an action will not lie in the King's Bench Division on an order for alimony made in the Probate and Divorce Division, and that decision is directly in point here

(1) (1858) 28 L. J. (Q.B.) 61.
(2) [1895] 1 Q. B. 611.
(3) [1896] 1 Q. B. 48.
(4) (1884) 13 Q. B. D. 855, at p. 860.

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because, by s. 52 of 20 & 21 Vict. c. 85, orders of the Divorce Court are to be enforced in the same manner as judgments, orders, and decrees of the Court of Chancery. The order in the present case was made by a judge of the Chancery Division, and it is therefore equivalent to a decree of the Court of Chancery, and consequently it cannot be enforced by an action in the King's Bench Division. [They also referred to *In re a Bankruptcy Notice* (1), *Robins* v. *Robins* (2), and *Ivimey* v. *Ivimey*. (3)]

Secondly, this action fails because it is an action to enforce an order for the payment of costs made in a proceeding which is of a criminal nature. *In re Freston* (4) decides that disobedience by a solicitor to an order of Court made against him as an officer of the Court does not give rise to a mere civil liability, but it is a contempt of a criminal nature which may end in his imprisonment. In that case the Court pointed out the distinction between attachments for the purpose of enforcing judgments in civil disputes and attachments for the purpose of enforcing orders against solicitors made in the exercise of the disciplinary jurisdiction of the Court, and the same distinction was pointed out in *Harvey* v. *Harvey*. (5) The present order, so far as it relates to the payment of costs, was made in a proceeding of a punitive nature against a solicitor for disobedience to an order of the Court. *Godfrey* v. *George* (6) is really an authority in the defendant's favour, for it was assumed that an action will not lie for the enforcement of an order made in proceedings of a quasi-criminal nature, but the decision was that the particular proceeding in question, the striking of a solicitor off the roll, was not a proceeding of that nature.

Reeve was only called upon to reply as to the first point. This order is not equivalent to a decree of the Court of Chancery, and the fact that it was made in the Chancery Division does not make it, in the words of Bowen L.J. in *Bailey* v. *Bailey* (7), "a mere equitable debt." Since the Judicature Act both Divisions of the High Court administer law and equity. Under

(1) [1907] 1 K. B. 478.
(2) [1907] 2 K. B. 13.
(3) [1908] 2 K. B. 260.
(4) (1883) 11 Q. B. D. 545.
(5) (1884) 26 Ch. D. 644.
(6) [1896] 1 Q. B. 48.
(7) 13 Q. B. D. at p. 860.

Order LXV., r. 26 (*a*), orders for delivery of bills of costs may be made in any Division of the High Court.

DARLING J. The question in this case is an unusual and somewhat difficult one. It arises out of an order made by Neville J. in the Chancery Division. [The learned judge read the order of November 12, 1909, and continued :—] It is said that this order is equivalent to a decree of the old Court of Chancery. In one sense that is true, for it is an order made in the Chancery Division; but it is said that it is equivalent to a decree of the Court of Chancery in the sense that it deals with a matter which depends on equity. I do not think that is so, for the same order could have been made in the King's Bench Division, and the matter is not one which depends in any way on the application of equitable doctrines. But an argument has been addressed to me founded upon a passage in the judgment of Bowen L.J. in *Bailey* v. *Bailey* (1), where, referring to *Hutchinson* v. *Gillespie* (2), he said, "It is there pointed out that no action will lie upon a decree in equity, because no promise can be implied at common law to pay a mere equitable debt." It is contended that the sum sued for in this action is a mere equitable debt, because it is a debt arising under an order made by a judge sitting in the Chancery Division; but judges sitting in that Division are now bound to administer the common law as well as equity, and there is in my opinion no pretence for saying that this is a mere equitable debt. It is just as much a debt from which a promise to pay can be implied as if the order to pay the costs of the motion had been made, as it might have been made, in the King's Bench Division. The fallacy underlying the contention that every order made by a judge of the Chancery Division is equivalent to a decree of the Court of Chancery becomes apparent when one remembers that at one time after the passing of the Judicature Act the judges of that Division tried criminal cases on circuit and sentenced prisoners. Can it be said that in so doing they were making decrees in equity? It was further contended that this action will not lie because, it is said, the order of November 12, 1909, is an order of

(1) 13 Q. B. D. at p. 860. (2) (1856) 11 Ex. 798.

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a criminal nature, and *In re Freston* (1) was cited in support of the proposition. In that case an order had been made against a solicitor to deliver up certain documents and to pay 10*l.* and certain costs. He delivered up the documents and paid the 10*l.*, but did not pay the costs, and he was arrested under an order for attachment for contempt of Court. The Court held that the contempt in that case was of a criminal nature, but it was pointed out in the judgments that attachments for contempt of Court are not all of the same kind, and the distinction was shewn by Chitty J. in *Harvey* v. *Harvey* (2), where he said: "The distinction as to contempt for non-payment of money was recognized as long ago as the year 1797, when the case of *Ex parte Parker* (3), referred to in Cooke's Bankruptcy Law (4) and cited in *M'Williams' Case* (5), was decided. In that case it was held that an attachment for non-payment of money was to be considered only as process to enforce payment of a debt and analogous to an execution." The order on which the plaintiff is suing in this action is an order for the payment of certain costs; it is in the words of Chitty J. to be considered only as process to enforce payment of a debt. That is to say, it is a purely civil matter; it is not a case where, as Lindley L.J. put it in *In re Freston* (1), there has been an order for an injunction or for the delivery up of documents. To ascertain how this order for the payment of costs can be enforced I turn to Order XLII., r. 24, which says that "Every order of the Court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect." Now, if this had been the case of a judgment for the payment of an ascertained sum for costs, it could have been enforced by an action. But it is contended that this order cannot be enforced by an action in the King's Bench Division, and reference has been made to Order XLII., r. 3, which provides that "A udgment for the recovery by or payment to any person of money may be enforced by any of the modes by which a judgment or decree for the payment of money of any Court whose jurisdiction

(1) 11 Q. B. D. 545.
(2) 26 Ch. D. at p. 653.
(3) (1797) 3 Ves. 554.
(4) Ed. of 1799, p. 115.
(5) (1803) 1 Sch. & Lef. 169.

is transferred by the principal Act might have been enforced at the time of the passing thereof." It seems to me that, if one were to construe that rule in the sense contended for by Mr. Spencer Bower, it would give rise to great difficulties, and I do not think that it was intended by that rule to perpetuate the distinction, which formerly existed, between a judgment of a Common Law Court, on which an action could be brought, and a decree of the Court of Chancery which could not be sued upon, for the reason given by Bowen L.J. in *Bailey* v. *Bailey* (1); but, as I have already said, the order on which this action is brought is not equivalent to a decree of the Court of Chancery, and, therefore, in construing Order XLII., r. 3, for the purpose of this case I leave out the word "decree," as it has no application. Then the rule says that a judgment for the payment of money may be enforced by any of the modes by which a judgment for the payment of money of any Court could have been enforced at the time of the passing of the Judicature Act, 1873. At that time a judgment of the King's Bench could be enforced by an action on the judgment. This order must, in my opinion, be treated as the equivalent of a judgment for the payment of money, on which an action will lie in the King's Bench Division, and, for the reasons which I have given, it does not make any difference that it was an order made in the Chancery Division. The object of the Judicature Act was to put an end to the difficulties which formerly arose from the existence side by side of the two separate systems, Chancery and common law, and I think that object is attained by reading the rules in the way in which I have read them.

Judgment for the plaintiff.

Solicitors for plaintiff: *Church, Rendell & Co.*
Solicitor for defendant: *William Wilde.*

(1) 13 Q. B. D. at p. 860.

F. O. R.

1910
April 7, 25.

EASTBOURNE GUARDIANS, APPELLANTS *v.* CROYDON GUARDIANS, RESPONDENTS.

Poor Law—Desertion—Separation Order—Lunatic—Irremovability—Appeal to Quarter Sessions—Poor Removal Act, 1861 (24 & 25 *Vict. c.* 55), *s.* 3—*Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 294, 303.

On October 28, 1902, a married woman left her husband because he had contracted a venereal disease by misconduct with other women. On November 17, 1902, on a complaint by her that her husband had deserted her, a Court of summary jurisdiction granted a separation order under the Summary Jurisdiction (Married Women) Act, 1895. The wife never subsequently cohabited with her husband, and she resided in the district of the respondent union for more than a year previously to October 6, 1908, on which date she was sent to an asylum as a pauper lunatic:—

Held, that the husband had deserted his wife within the meaning of s. 3 of the Poor Removal Act, 1861; that the separation order did not put an end to the desertion; and that the wife was, therefore, irremovable from the respondent union.

Quære, whether the separation order was conclusive, or admissible, evidence of the fact of desertion.

Sects. 286 to 298 of the Lunacy Act, 1890, which provide that, where the settlement of a pauper lunatic can be ascertained, the expense of maintaining the lunatic shall be paid by the union in which the lunatic's settlement is, and, where that cannot be ascertained, by the union in which the lunatic has become chargeable, must be read subject to the exception in s. 294 that where a lunatic has become irremovable from a union the expenses shall be paid by that union and not by the union where the lunatic's settlement is, and, therefore, s. 303, which gives a right of appeal to quarter sessions against an order of justices adjudging the settlement of a lunatic, must be read as giving a similar right of appeal against an order adjudging that a lunatic has become irremovable.

SPECIAL CASE stated for the opinion of the Court pursuant to 12 & 13 Vict. c. 45, s. 11.

On February 18, 1909, an order was made under s. 289 of the Lunacy Act, 1890 (1), by two justices of the peace acting in and

(1) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 288: "Any two justices for the county or borough in which an institution for lunatics where a pauper lunatic is or has been confined is situate, or to which such institution being an asylum wholly or in part belongs, or from any part of which any pauper lunatic is or has been sent for confinement, may, at

for the borough of Croydon, whereby they adjudged that one Margaret Sandifer, a pauper lunatic, was last legally settled in the parish of Eastbourne, and ordered that the appellants, the guardians of the poor of the said parish, should pay unto the respondents, the guardians of the poor of the Croydon Union, the sum of 17*l.* 8*s.*, being the reasonable expenses incurred by the guardians of the Croydon Union in and about the examination of the said Margaret Sandifer and her conveyance to an asylum and for the past cost, and the sum of 14*s.* per week or some other reasonable sum in respect of the future cost of her lodging, maintenance, clothing, medicine, and care in the said asylum.

The appellants, the guardians of the poor of the Eastbourne Poor Law Union, on April 3, 1909, caused due notice of appeal to the then next Court of general quarter sessions of the peace to be holden at Croydon in and for the said borough of Croydon against the said order to be duly served, and such appeal was entered and respited.

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any time, inquire into the settlement of the pauper lunatic."

Sect. 289: "If satisfactory evidence can be obtained as to such settlement in any union, such justices shall, by order, adjudge the settlement, and order the guardians of the union to pay to the guardians of any other union the expenses incurred in or about the examination of the lunatic and the bringing him before a justice or justices, and his removal and conveyance to or from any institution for lunatics (in this Act referred to as the incidental expenses), and all moneys paid by such last-mentioned guardians to the treasurer or manager of the institution for the expenses of maintenance of the lunatic, and incurred within twelve months previous to the date of such order, and, if the lunatic is still in confinement, also to pay to the treasurer or manager of the institution the reasonable expenses of the future maintenance of such lunatic."

Sect. 294: "All incidental expenses and expenses of maintenance of a lunatic removed to an institution for lunatics who would at the time of his removal have been exempt from removal to the parish of his settlement or the country of his birth by reason of some provision of the Poor Removal Act, 1846, as amended by subsequent Acts, shall be paid by the guardians of the union wherein the lunatic has acquired such exemption, and no order shall be made in respect of such lunatic under any provision contained in this or any other Act upon the guardians of the union in which the lunatic is settled while the above-mentioned expenses are to be paid and charged as herein provided."

Sect. 303: "If the guardians of any union feel aggrieved by any order adjudging the settlement of a lunatic, they may appeal to the quarter sessions . . . ."

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By order of Jelf J., dated December 21, 1909, and by agreement between the appellants and respondents, this case was stated for the opinion of the Court, the parties agreeing that judgment in conformity with the decision of the Court might be entered on motion by either party at the sessions.

The facts stated in the case were as follows:

1. Margaret Sandifer (hereinafter called the wife) is the lawful wife of Clifford Arthur Sandifer (hereinafter called the husband), to whom she was married on June 19, 1898.

2. The last legal settlement of the husband is in the parish of Eastbourne by reason of his residence there for three years prior to the year 1893, and the husband has now that settlement.

3. From the date of the marriage until January 28, 1902, the wife and the husband resided and cohabited at various places in Sussex and elsewhere.

4. On January 28, 1902, the wife and the husband went to reside at No. 18, Kilda Street, Eastbourne.

5. In November, 1902, the wife (who was then living apart from her husband, having left him on October 28, 1902, because he had contracted a venereal disease by misconduct with other women as hereinafter referred to, she living at 30, Dudley Road, Eastbourne, while he lived at 12, Stanley Road, in the said borough) made complaint to the justices of the peace of the said borough, alleging that the husband had deserted her, and the justices summoned the husband to answer the complaint. On November 17, 1902, the husband appeared before two of the said justices sitting as a Court of summary jurisdiction, and the Court, after hearing the husband in defence, held that the wife had duly proved her case, and that the husband had contracted an infectious disease by reason of his adultery with another woman, and accordingly made an order as a petty sessional Court under the Summary Jurisdiction (Married Women) Act, 1895, adjudging that the matter of the said complaint was true, and that the wife should be no longer bound to cohabit with her husband, that the legal custody of the three children of the marriage while under the age of sixteen should be committed to the wife, and that the husband should pay for the use of the wife the weekly sum of 12*s*.

6. The wife has not cohabited with the husband since the making of the order, and in April, 1906, the wife went to reside in the borough of Croydon. While the wife was resident in the said borough, namely, from April 3, 1907, to July 8, 1907, the husband became chargeable to and was relieved by the appellants as a lunatic in the Wellingly Asylum, being the lunatic asylum for the borough of Eastbourne.

7. The husband has at various times paid to and for the use of the wife the weekly sum by the said order ordered to be paid.

8. On October 6, 1908, the wife was removed by order of a justice of the peace for the borough of Croydon as a lunatic to the Croydon Mental Hospital, Warlingham, which is the lunatic asylum for the borough of Croydon, and was chargeable to the respondents' union.

9. On February 18, 1909, the order of that date from which this appeal is brought was made. By the said order, after reciting that it was proved to the justices that the wife was chargeable to the common fund of the respondents' union and that it was proved that the parish of Eastbourne in the appellants' union was the place of the last legal settlement of the wife, it was adjudged that the place of the last legal settlement of the wife was in the parish of Eastbourne and ordered that the appellants should pay to the respondents the sums therein mentioned and to the treasurer of the said asylum the weekly sum of 14*s*.

10. On the facts above stated the appellants contend:

(1.) That the wife being a married woman, who has been deserted by her husband, who has not returned to cohabit with her, and the wife having after his desertion resided in the borough of Croydon for a period of one year in such a manner as would if she were a widow have rendered her exempt from removal from the said parish at the time she was sent to the asylum, the wife has become irremovable from the parish of Croydon under s. 3 of the Poor Removal Act, 1861 (1), and her true settlement is in the said parish.

(1) Poor Removal Act, 1861 (24 & 25 Vict. c. 55), s. 3: "Where a married woman shall have been deserted by her husband, and shall

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(2.) That the order of the justices of the peace of the borough of Eastbourne of November 17, 1902, is conclusive as to the facts of the desertion.

(3.) That the said order was right and well founded in law.

(4.) That there has been desertion within the meaning of s. 3 of the Poor Removal Act, 1861.

11. The respondents contend:

(1.) That the wife takes, retains, and follows the settlement of the husband in the parish of Eastbourne in the appellants' union.

(2.) That the effect of the order of November 17, 1902, was to prevent the husband from cohabiting with the wife, and that after the making of the order she was not a deserted wife within the meaning of the Poor Removal Act, 1861.

(3.) That the wife did not reside in the parish of Croydon for the period of three years in such manner and under such circumstances as would render her irremovable in each of such three years and has not acquired a settlement in the parish of Croydon and is not irremovable from the respondents' union.

(4.) That inasmuch as by the said order the husband was ordered to pay and did pay the weekly sum of 12*s.* for the use of the wife, she was not a deserted wife within the meaning of s. 3 of the Poor Removal Act, 1861.

(5.) That the effect of the said order was that the status of the wife becomes that of a woman living under an order of separation from her husband, and that, assuming (which the respondents do not admit) that the husband had deserted the wife before the making of the said order, the said order put an end to such desertion because it was made on the application of the wife and because by it it was adjudged that the wife be no longer bound to cohabit with her husband.

12. The question for the decision of the Court is whether the

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after his desertion reside for three years" (since reduced to one year by the Poor Law Amendment Act, 1866 (29 & 30 Vict. c. 113), s. 17), "in such a manner as would, if she were a widow, render her exempt from removal, she shall not be liable to be removed from the parish wherein she shall be resident, unless her husband return to cohabit with her."

order of February 18, 1909, adjudging that the last legal settlement of the wife was in the parish of Eastbourne is correct in law.

Rawlinson, K.C., and *Courthope Munroe*, for the appellants. It cannot be denied that the order of February 18, 1909, was correct in so far as it adjudged the wife's settlement to be in Eastbourne; but the order was wrong in making the appellants liable to pay for the wife's maintenance. She was a deserted wife within s. 3 of the Poor Removal Act, 1861, and, having resided in Croydon for more than a year after her desertion, she is not now liable to be removed from that parish, and therefore the expense of maintaining her must, under s. 294 of the Lunacy Act, 1890, be borne by the respondents and not by the appellants. She was deserted by her husband on October 28, 1902, when by reason of his conduct she was compelled to leave him: *Sickert* v. *Sickert*. (1) The order of the justices of November 17, 1902, is conclusive as to the fact of desertion. When once a wife has been deserted it is immaterial for the purpose of s. 3 of the Act of 1861 that the desertion does not continue during the whole period of residence necessary to render the wife irremovable. In this respect desertion under the Act of 1861 differs from desertion for the purpose of the Divorce Court, where two years' continuous desertion is required, and accordingly it was held in *Dodd* v. *Dodd* (2) that under the Divorce Acts there can be no desertion after a separation order has been obtained from a magistrate, because after a separation order it is not in the power of the husband to resume cohabitation. Vaughan Williams L.J. in *Harriman* v. *Harriman* (3) suggested that there may be a distinction between desertion where the husband simply leaves his wife and desertion where the husband's conduct has been such that it is impossible for his wife to continue to live with him. The present case would come within the latter class. It is clear, however, from *Reg.* v. *Maidstone Union* (4) and *Southwark Union* v. *City of London Union* (5) that the Divorce Court rules as to

(1) [1899] P. 278.
(2) [1906] P. 189.
(3) [1909] P. 123, at p. 135.
(4) (1879) 5 Q. B. D. 31.
(5) [1906] 2 K. B. 112.

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desertion do not apply to cases under s. 3 of the Act of 1861; and the wife having been deserted on October 28, 1902, the fact that she subsequently obtained a separation order did not in any way prevent the desertion from continuing for the purpose of s. 3 of the Act of 1861.

Danckwerts, *K.C.*, and *Bethune*, for the respondents. The only question asked by this special case is whether the order of February 18, 1909, adjudging that the last legal settlement of the wife was in the parish of Eastbourne, is correct in law. It is not now contended by the appellants that that adjudication is wrong. The point which has been argued for the appellants, that the wife is irremovable from Croydon and that the expenses of maintaining her are under s. 294 of the Lunacy Act, 1890, payable by the respondents, is not one which can be taken on this special case. The case is stated under Baines' Act on an appeal to quarter sessions. The only right of appeal against an order of justices relating to a pauper lunatic is, by s. 303 of the Lunacy Act, 1890, in respect of an "order adjudging the settlement of a lunatic." In so far as the order of February 18, 1909, ordered the appellants to pay the expenses of the wife's maintenance it is not appealable. That part of the order is said to be wrong on the assumption that the wife was irremovable from Croydon, but irremovability is not co-extensive with a settlement (except for the purposes of s. 34 of the Divided Parishes Act, 1876); and under the Act of 1890 there is no right of appeal to quarter sessions on a question of irremovability. Quarter sessions would, therefore, have had no jurisdiction to deal with that question, and it follows that this Court equally cannot do so. If that part of the order which orders the appellants to pay the expenses of the wife's maintenance was wrong the appellants' proper remedy was certiorari.

Secondly, there has not in this case been any desertion of the wife so as to render her exempt from removal under s. 3 of the Act of 1861. The separation order is not evidence against the respondents, for it is res inter alios: Law of Estoppel in British India, by Caspersz, 3rd ed., p. 267. The cases on desertion shew that to constitute desertion in law there must be some act on the part of the husband, either in

leaving his wife, or in sending her away, or in preventing her from coming back again: *Reg.* v. *St. Mary, Islington* (1); *Reg.* v. *Cookham Union* (2); *Frowd* v. *Frowd.* (3) In the present case the wife may have had grounds for divorce by reason of her husband's cruelty and adultery; but she voluntarily left him; he did not desert her; and it is desertion, not cruelty or adultery, which confers on the wife that which has been called the privilege of irremovability. The judgments of the Court of Appeal in *Southwark Union* v. *City of London Union* (4) shew that the decision in *Reg.* v. *Maidstone Union* (5) is not to be extended; and in both those cases the wife did not leave voluntarily, but at the request or order of the husband. [*Ward* v. *Ward* (6) was also referred to.] Further, a deserted wife, under s. 3 of the Act of 1861, in order to become irremovable must reside for one year in a parish in such a manner as would, if she were a widow, render her exempt from removal. During the year previous to October 6, 1908, the date on which the wife became chargeable, she was not living in Croydon as a deserted wife; she was living apart from her husband under a separation order which entitled her to do so. The desertion, if any, ceased when the separation order was made: *Piper* v. *Piper* (7); *Dodd* v. *Dodd.* (8) For this purpose the decisions as to desertion under the Divorce Acts apply. Lastly, s. 294 of the Lunacy Act, 1890, only applies to persons who have become irremovable by reason of some provision of the Poor Removal Act, 1846, as amended by subsequent Acts. This woman, if irremovable, became so under s. 3 of the Poor Removal Act, 1861, as amended by 29 & 30 Vict. c. 113, and not under the Act of 1846 as amended by subsequent Acts. Sect. 294, therefore, does not apply to this case.

Rawlinson, K.C., was only called upon to reply as to the desertion. The separation order is evidence of the state of affairs existing at that time between the husband and wife, and it shews that she had left him because his conduct rendered it impossible for her to continue to live with him. Thenceforward

(1) (1870) L. R. 5 Q. B. 445.
(2) (1882) 9 Q. B. D. 522.
(3) [1904] P. 177.
(4) [1906] 2 K. B. 112.
(5) 5 Q. B. D. 31.
(6) (1858) 1 Sw. & Tr. 185.
(7) [1902] P. 198.
(8) [1906] P. 189.

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she was a deserted wife within s. 3 of the Act of 1861. [He referred to *Graves* v. *Graves*. (1)]

Cur. adv. vult.

April 25. The judgment of the COURT (Lord Alverstone C.J., Channell and Bray JJ.) was read by

CHANNELL J. This is a case stated under Baines' Act on an appeal to quarter sessions by the guardians of Eastbourne against an order of justices adjudging that the settlement of a pauper lunatic, who had been sent to an asylum from Croydon, was in Eastbourne, and, further, ordering the guardians of Eastbourne to pay for the maintenance of the pauper lunatic. The order was made under s. 289 of the Lunacy Act, 1890, and the appeal is presented under s. 303 of that Act. On the case as stated there is a contention on the part of the appellants that the settlement of the pauper was in Croydon and not in Eastbourne, but on the argument of the case it was admitted on the part of the appellants that this could not be maintained, as the pauper had not before the material time resided as long as three years in Croydon, and this contention having been abandoned, reliance was placed on the contention that the pauper, although not settled in Croydon, was irremovable from Croydon by reason of residence there for upwards of one year. It is clear, when the statutes are referred to and the main facts are ascertained, that the question as to whether Eastbourne or Croydon is to pay the expense of maintaining the lunatic depends on whether the pauper resided in Croydon under such circumstances as to make her irremovable, and that is a question which on the special facts stated in the case is one of considerable difficulty; but before proceeding to deal with it it is convenient to deal with an objection made by Mr. Danckwerts for the respondents that that question cannot be gone into on this appeal. He contends that no appeal is given by the statute (s. 303) except against an adjudication as to the settlement of a pauper, and that this order so far as it adjudicated the settlement to be in Eastbourne is now admitted to be correct. This objection makes it necessary to consider carefully the provisions

(1) (1864) 3 Sw. & Tr. 350.

of the Lunacy Act, 1890. Sects. 286 to 298 deal with the liability for expenses of maintenance of pauper lunatics, and, subject to s. 294, the provision is that where the settlement of the pauper can be ascertained the maintenance expense is to be paid by the union in which the settlement is, and where that cannot be ascertained by the union in which the lunatic has been found chargeable. Machinery is provided for carrying this into effect by orders of justices, and the words used in all the sections, except s. 294, including the sections 301 to 303, as to appeals, are all appropriate to the case of the paying union being the union where the settlement is. Sect. 294, however, provides for a particular case, namely, where a pauper though settled in one union is irremovable from some other, that other of course being usually the union in which the lunatic has been found. In such cases the union which has to pay is the union in which the status of irremovability has been obtained, and not the union of settlement; and it is expressly provided by the section that in such a case no order for payment of maintenance shall be made upon the union of settlement. We think that this must be read as an exception to the whole code contained in the sections 286 to 303, and read as an exception into each section when it is necessary to apply that section to a case of irremovability. There is no express power to make an order on the union where there is the irremovability, but that cannot be meant, and we think that, in the particular case where there is the irremovability, expressions as to "union of settlement," when used to describe the union which is made liable, must include unions from which there is irremovability. Further, the case before us is within the express words of s. 303. It is an order adjudicating settlement, and it is an order by which the appellants are aggrieved, although it is true that the part of the order by which they are aggrieved is not so much the adjudication of the settlement, but the order to pay. We think that it is intended by s. 303 to give an appeal against the substantive and operative part of the order, and that the appeal lies against this order on the ground, if the appellants can make it out, that the pauper was irremovable from Croydon, and that for that reason Eastbourne is not liable to pay.

This brings us to the consideration of the real question on

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which the liability to maintain depends. The pauper was a married woman, and except for the enactment in s. 3 of the Poor Removal Act, 1861 (24 & 25 Vict. c. 55), she could not by residence apart from her husband acquire a status of irremovability any more than she could acquire a settlement apart from him. The question, therefore, arises as to whether she can be considered to be a deserted wife within the meaning of that section. The facts are stated in paragraph 5 of the special case: "In the month of November, 1902, the wife (who was then living apart from her husband, having left him on October 28, 1902, because he had contracted a venereal disease by misconduct with other women as hereinafter referred to, she living at 30, Dudley Road, Eastbourne, while he lived at 12, Stanley Road, in the said borough) made complaint to the justices of the peace of the said borough, alleging that her husband had deserted her." A summons having been issued, the justices, after hearing the husband, held "that the wife had duly proved her case, and that the husband had contracted a venereal disease by reason of his adultery with another woman, and accordingly made an order under the Summary Jurisdiction (Married Women) Act, 1895, adjudging that the matter of the said complaint was true, and that the wife should be no longer bound to cohabit with her husband," that the custody of the children should be committed to the wife, and that he should pay 12*s.* a week for the use of his wife. The wife has not cohabited with her husband since the making of the order, and in April, 1906, went to reside at Croydon, and had so resided for upwards of a year before she became lunatic and chargeable there. On these facts the question arises whether when so residing at Croydon she was a deserted wife within the meaning of the statute. There have been several decisions as to the meaning of this statute. The first case to which it is necessary to refer is *Reg.* v. *Maidstone Union* (1), where a very wide view of the statute was taken by Cockburn C.J., and a similar though somewhat less wide view by Manisty J., and the wife was held to be deserted. This case was followed by *Reg.* v. *Cookham Union* (2), where Field and Cave JJ. held that the wife was not in the circumstances of that case to be treated as deserted, and then

(1) 5 Q. B. D. 31. (2) 9 Q. B. D. 522.

the case of *Southwark Union* v. *City of London Union* (1) came before the Court of Appeal, and the cases were reviewed. The Court of Appeal affirmed the authority of *Reg.* v. *Maidstone Union* (2), but expressed a doubt as to whether Cockburn C.J. did not go too far, and they expressly adopted the judgment of Manisty J. as stating correctly the construction of the section in question. Manisty J. had said: "I think we ought not to put too narrow a construction on 24 & 25 Vict. c. 55, s. 3, and that it must be taken to mean that where a woman is, whether rightfully or wrongfully, sent away by her husband so as to be left as a free woman she can so reside as to gain a settlement apart from him unless he return to cohabit with her." The learned judge goes on to say that it is unnecessary to express an opinion as to the construction of 39 & 40 Vict. c. 61, s. 34, and for the purposes of the case now before us we may read the words of his judgment "so as to gain a settlement" as if they were "so as to become irremovable." Under these circumstances it seems to me that we must put a much wider construction on the word "desertion" in the statute in question than in the Divorce Act, and that the desertion necessary to enable a wife to become irremovable is not at all the same as would be necessary to entitle her to the relief in the Divorce Court which a wife gets if "deserted" for two years. For instance, if there were in this case no doubt about the fact of the original desertion, it would in my opinion be quite impossible to hold that, for the purpose of preventing the pauper being a deserted woman so as to gain a status of irremovability, the desertion was put an end to by her obtaining the separation order from the magistrates, so that when she came to Croydon after that order, which expressly stated desertion, she could not be said to be "deserted" within the Act of 1861, although according to the cases, especially *Harriman* v. *Harriman* (3), it would have the effect of putting an end to the desertion so far as divorce is concerned. It may be observed that for the purpose of divorce the desertion must continue for a period, that is, two years. The word, therefore, must refer to a continuous state of things, whereas in the Act of 1861 it seems to be an act of desertion

(1) [1906] 2 K. B. 112. (2) 5 Q. B. D. 31.
(3) [1909] P. 123.

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which is referred to, and its effect is to continue until the husband returns to cohabitation. In these cases on the Poor Removal Act, 1861, the difficulty felt by the Courts appears to have been in dealing with cases where the wife was in fault, and they naturally hesitated to give her a privilege by reason of something which was her own fault. Here, on the facts stated, the wife, even if it be true that she voluntarily left her husband (which on the statement of facts in the case is left a little doubtful), did so by reason of his misconduct, and I think we are justified in holding that he, according to *Sickert* v. *Sickert* (1), was the party "who intended to bring the cohabitation to an end and whose conduct in reality caused its termination," and, that being so, we may hold that she was "sent away by her husband" within the meaning of the words used by Manisty J. and affirmed by the Court of Appeal. In this case she was, of course, if sent away at all, wrongfully sent away, and there is much less difficulty in holding that to be desertion than when rightfully sent away. I do not think it necessary to decide the question whether the order of the magistrates is either conclusive evidence or admissible evidence of the fact of the desertion for the purpose of the Poor Removal Act, 1861, but as the fact of her having got such an order would entitle her to acquire property apart from her husband and in fact has the operation of a decree of judicial separation, it would be a little strange if it did not so far authorize her living apart from him as to become irremovable. She seems to us to have had a right to choose to reside in Croydon, to have done so in fact, and if she had not become a lunatic, but had become merely chargeable, we cannot think that any Court would have ordered her removal from Croydon. Our judgment must be for the appellants.

Appeal allowed.

Solicitors for appellants: *Lawson Lewis & Wenham, for F. Lawson Lewis, Eastbourne.*

Solicitor for respondents: *F. W. Morris.*

(1) [1899] P. 278.

F. O. R.

HOPKINS *v.* HILLS.

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April 11.

Money-lender—Carrying on Business elsewhere than at Registered Address—Collecting Repayment of Loans—Money-lenders Act, 1900 (63 & 64 *Vict.* c. 51), *s.* 2, *sub-s.* 1 (*b*).

A money-lender who receives at a place which is not his registered address money in repayment of loans previously made does not thereby carry on business elsewhere than at his registered address within the meaning of s. 2, sub-s. 1, of the Money-lenders Act, 1900.

Case stated by a metropolitan police magistrate.

The respondent, Elizabeth Hills, was summoned under s. 2, sub-s. 1 (*b*), of the Money-lenders Act, 1900, for having on August 14, 1909, carried on her business of a money-lender elsewhere than at her registered address.

The following facts were found. The respondent on August 14, 1909, was a registered money-lender, with her registered address at 19, Southwark Park Road, Bermondsey. On that day she went to Grange Road, Bermondsey, for the purpose of receiving sums of money in repayment of loans previously made by her, and between 1.45 p.m. and 2.10 p.m. she did actually receive twelve different sums of money from twelve different women in repayment of such loans.

The magistrate was of opinion that the Money-lenders Act was passed for the protection of the borrower, and that after the loan was made and completed the borrower was no longer in need of protection, and that therefore the receiving of money in repayment of loans was not part of the business of a money-lender within the meaning of the section. He accordingly dismissed the summons.

Bodkin, for the appellant. The respondent carried on a part of her money-lending business elsewhere than at her registered address, namely, in the public street in Grange Road. The fact that in the short space of half an hour she received payment there from as many as twelve different persons shewed that it was well known that she was to be found in that spot for the purpose of receiving repayment of loans; in other words it shewed that

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she made a practice of receiving repayment there. That amounted to a carrying on of her money-lending business there within the meaning of the section. The magistrate considered himself bound by the case of *Bradford* v. *Dawson* (1), where it was held that the use of a public-house bar by a bookmaker for the purpose of paying bets to persons who had made the bets with him elsewhere was not a use of the place by him for the purpose of "betting with persons resorting thereto." But Wright J., while concurring in that decision, said that it seemed "hard to come to the conclusion that payment of bets is not an important element in the business of betting." Had the words of that Act been "used for the business of betting" he would have held otherwise. In *Jackson* v. *Price* (2) Darling J. no doubt held that the mere fact that the money advanced by a money-lender was sent to the borrower by post instead of being handed to him at the money-lender's registered address did not constitute a breach of the Money-lenders Act. But that was an isolated transaction; the delivery of the money there was not, like the receipt of the repayment in the present case, part of an habitual practice or course of business.

Micklethwaite, for the respondent. Collecting money in repayment of loans is no part of the business of lending. The objects of ss. 1 and 2 of the Act are different. That of s. 1 is to enable money-lending transactions to be reopened after they are closed. That of s. 2 is to protect the borrower while the matter of the loan is still in negotiation and while the money-lender is in a position to dictate terms. Upon the question whether particular conduct amounts to carrying on business within the meaning of the Act, no distinction is to be drawn between an isolated act and a practice of doing similar acts: *Gadd* v. *Provincial Union Bank.* (3) If the former is not within the Act neither is the latter. As Darling J. said in *Jackson* v. *Price* (2), "The statute does not say that every detail of each money-lending transaction must be carried out at the registered address." Suppose the lender becomes bankrupt or dies, can his trustee or executor be said to be carrying on the business of a

(1) [1897] 1 Q. B. 307. (2) [1910] 1 K. B. 143.
(3) [1909] 2 K. B. 353.

money-lender merely because he accepts repayment of the money advanced?

LORD ALVERSTONE C.J. In this case the magistrate has refused to convict a money-lender of carrying on her business elsewhere than at her registered address, when all that was proved against her was that she collected repayment of her loans in the street. I think the magistrate was quite right. I do not think that the Act has gone so far as to say that acts which could not under ordinary circumstances be done at the registered address must if done elsewhere be regarded as contraventions of its provisions. The lender may be unable to get repayment at his office, for he has no means of compelling the borrower to come there. Therefore I cannot think it was intended to prohibit the acceptance of repayment in other places.

CHANNELL J. I am of the same opinion. I think that the requirement that the money-lender "shall carry on the money-lending business . . . . at his registered address" means that he shall carry on at that address so much of the business as it is reasonably practicable for him to carry on there, and that it was not intended to preclude him from asking for repayment of the money in any place where he could get it.

BRAY J. concurred.

Appeal dismissed.

Solicitors for appellant: *Wontner & Sons.*
Solicitor for respondent: *Solicitor to the Treasury.*

J. F. C.

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April 19.

PARKER *v.* JONES.

Landlord and Tenant—Proviso for Re-entry for Breaches of Covenant—Breach of Covenant not to underlet—Surrender of Lease—Acceptance of, by Lessor in Ignorance of Underlease—Reletting by Lessor—Entry by new Tenant—Effect of, on Interest of Underlessee.

A tenant of a field under a lease containing a covenant not to underlet without licence, and a proviso that on breach of the covenant the lessor might re-enter, in breach of his covenant underlet it to the plaintiff on a yearly tenancy. Subsequently the tenant surrendered his term to the lessor, who accepted the surrender in ignorance of the subletting and of the fact of the plaintiff's occupation. The lessor then relet the field to the defendant, who, upon the plaintiff refusing to give up possession, entered and turned out the plaintiff's cattle. The plaintiff had received no notice to quit. In an action to recover possession of the land:—

Held, that the plaintiff was entitled to judgment:

By Darling J., upon the ground that, assuming that the lessor was not precluded by the surrender from enforcing his right to forfeit the plaintiff's interest, inasmuch as he had accepted the surrender without notice of that interest, the reletting to a new tenant and entry by that tenant did not operate as an entry by the lessor so as to effect a forfeiture, and that the plaintiff's interest was still subsisting.

By Bucknill J., upon the ground that the acceptance of the surrender by the lessor precluded him from subsequently forfeiting the plaintiff's interest, whether at the time of the surrender he had notice of that interest or not.

Appeal from the Carnarvon County Court.

By a lease dated February 11, 1896, Mr. Assheton Smith let to William Hamer a house and field on a yearly tenancy commencing as from November 12, 1895. The lease contained a covenant by the lessee not to underlet the whole or any part of the demised lands without leave in writing of the lessor or his estate agent, and a proviso that upon breach of any of the tenant's covenants the lessor might re-enter, and thereupon the tenancy should determine. On November 12, 1899, Hamer in breach of his covenant sub-let the land to the plaintiff as a yearly tenant. Of this sub-letting neither Mr. Assheton Smith nor his agent had any knowledge, and the plaintiff continued in occupation of the land for ten years. On April 21, 1909, Hamer informed the plaintiff that he was about to surrender his

tenancy, and shortly afterwards he surrendered it to his landlord. On June 14, 1909, Mr. Assheton Smith relet the premises to the defendant. The plaintiff declined to give the defendant possession, insisting that he was lawfully in possession and entitled to a notice to expire on November 12, 1910. The defendant gave the plaintiff notice that if he did not remove his stock he would turn it out. The plaintiff refused, and the defendant thereupon entered upon the premises and turned the plaintiff's cattle out on to the road. The plaintiff then brought his action to recover possession of the field and damages for the trespass. The county court judge held that the plaintiff must be taken to have had constructive notice of the covenants in Hamer's lease, that as against the lessor his possession of the land was wrongful, and that upon the surrender of Hamer's tenancy he became a trespasser as against the defendant, who lawfully claimed through the lessor. He accordingly gave judgment for the defendant.

The plaintiff appealed.

R. M. Montgomery, for the plaintiff. The county court judge was wrong in treating the plaintiff as a trespasser. Although Hamer had covenanted not to sub-let, his sub-letting in breach of that covenant was not unlawful. It gave the landlord a right to forfeit the term, and had he exercised that right the plaintiff's interest would have been forfeited too. But until forfeiture the plaintiff's interest remained perfectly valid. The lessor never forfeited the term, but accepted a surrender of it from the tenant. It was held in *Mellor* v. *Watkins* (1) that a voluntary surrender by a lessee could not affect the interest of his sub-lessee. There the owner of two adjoining houses, Nos. 4 and 5, let No. 5 to one Allen and No. 4 to the defendant. Allen then sub-let the cellars in No. 5 to the defendant as a yearly tenant. Subsequently the tenant of No. 5 surrendered it to the lessor, who relet it to the plaintiff. The plaintiff demanded possession of the cellars and, on the defendant refusing to give them up, brought the action to recover possession. It was held that the defendant was entitled to retain

(1) (1874) L. R. 9 Q. B. 400.

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possession until he had received a proper notice to quit, and that it made no difference that the defendant had had due notice of the surrender. The same principle was laid down in *Great Western Ry. Co.* v. *Smith* (1), that where a lessee creates a derivative interest in a third person, a subsequent surrender of the term to the lessor will not affect that derivative interest, even though at the time of the surrender the lessor had good ground for a forfeiture. Mellish L.J. stated the law on this point thus: "It is a rule of law that if there is a lessee and he has created an underlease, or any other legal interest, if the lease is forfeited, then the underlessee, or the person who claims under the lessee, loses his estate as well as the lessee himself; but if the lessee surrenders he cannot, by his own voluntary act in surrendering, prejudice the estate of the underlessee or the person who claims under him." Then as soon as the landlord here had accepted a surrender his right of forfeiture for the breach of covenant was gone. The result was that the landlord had no right to relet the premises to the defendant until after the expiry of a notice to the plaintiff to quit.

Slater, for the defendant. The acceptance by Mr. Assheton Smith of the surrender by Hamer did not in any way affect the former's right to evict the plaintiff on discovery of the fact that he was in possession. The judgment of Mellish L.J. in *Great Western Ry. Co.* v. *Smith* (1) is in the defendant's favour. The passage cited from it continues thus: "If the question arose between an underlessee and the landlord, the moment the surrender was produced, and it appeared in Court that there was a surrender of the estate, I have no doubt that a common law Court must necessarily hold that the landlord had waived all right to forfeiture by accepting a surrender." He rests the extinguishment of the right upon the ground of waiver. But there can be no waiver without knowledge of the facts. And in the present case the lessor had no knowledge either of the liability to forfeiture by reason of the breach of covenant or of the acquisition by the plaintiff of an interest in the premises. The facts in *Great Western Ry. Co.* v. *Smith* (1) were very different. There a railway company bought land without the minerals and made

(1) (1876) 2 Ch. D. 235.

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a railway on it. The landowner granted a lease of the minerals, and the lessee gave the company notice of intention to work the minerals under the railway, whereupon the company gave him a counter-notice under s. 78 of the Railways Clauses Act and paid him compensation for leaving them. Subsequently the lessee fell into arrear with his rent and surrendered the lease to the lessor. Shortly afterwards the lessor sought to work the minerals under the railway. The Court treated the railway company as being in the position of an underlessee and held that, although at the time of the surrender there was a ground of forfeiture for non-payment of the rent, the surrender could not be treated as equivalent to forfeiture. They accordingly restrained the lessor from working the minerals. But there the lessor knew of the liability of the term to forfeiture, and also presumably knew of the acquisition of the company's interest in the minerals, for it is not likely that a railway company would pay compensation to a mining tenant without first giving some notice to his landlord. Therefore there was good reason there for holding that the surrender operated as a waiver of the lessor's right to evict the company. The landlord here, having a right of entry upon the plaintiff, exercised that right by reletting the land to the defendant, who entered and ousted the plaintiff as he was entitled to do.

Montgomery in reply.

DARLING J. Apparently the question which we have to decide has not arisen for decision before, and I have felt some hesitation in arriving at the conclusion to which I have come. It appears that Mr. Assheton Smith in 1896 let a house and field to Hamer as a yearly tenant, the tenancy being terminable by notice on November 12 in any year. The lease contained a covenant by the lessee not to underlet any part of the demised premises without the consent of the lessor, and also a proviso for re-entry by the lessor on breach of any of the lessee's covenants. In breach of that covenant Hamer underlet a portion of the premises to the plaintiff upon terms which as between the plaintiff and Hamer constituted the plaintiff a yearly tenant. The plaintiff occupied the premises so underlet to him for ten years, and the county court judge has found that neither

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Darling J.

Mr. Assheton Smith nor his agent had any knowledge of this sub-letting.

In April, 1909, Hamer surrendered his tenancy to his lessor, who thereupon relet the premises to the defendant. As the plaintiff declined to give up possession, the defendant entered and turned out the plaintiff's cattle. The plaintiff complained of that as a trespass. The question is whether the lessor had in the circumstances a right to relet the premises to the defendant or whether the plaintiff was entitled to remain in possession till the following November 12. No doubt Hamer had by underletting given his lessor a right to forfeit his tenancy, and if the lessor had elected to forfeit it, the plaintiff might have become a trespasser had he remained in possession. But the lessor did not forfeit the tenancy. Instead he accepted a surrender, and the question is what was the effect of his so doing? The cases bearing on this matter are *Mellor* v. *Watkins* (1) and *Great Western Ry. Co.* v. *Smith.* (2) In the former case a lessee of a house sub-let the cellars to the defendant and some time afterwards surrendered his lease to his lessor. The lessor, without giving the defendant notice to quit, relet the house to the plaintiff, who sued the defendant for keeping him out of possession of the cellars. Cockburn C.J. said: "It is clear that when a person voluntarily surrenders his lease, he cannot by so doing put an end to an under-tenancy created by himself; and therefore there must be judgment for the defendant . . . . on the ground that an underlessee's rights cannot be put an end to by a voluntary surrender of the lessor's interest." In *Great Western Ry. Co.* v. *Smith* Mellish L.J. said (3): "It is a rule of law that if there is a lessee and he has created an underlease, or any other legal interest, if the lease is forfeited, then the underlessee, or the person who claims under the lessee, loses his estate as well as the lessee himself; but if the lessee surrenders he cannot, by his own voluntary act in surrendering, prejudice the estate of the underlessee or the person who claims under him. If the question arose between an underlessee and the landlord, the moment the surrender was produced, and it appeared in Court that there was

(1) L. R. 9 Q. B. 400. (2) 2 Ch. D. 235.
(3) 2 Ch. D. at p. 253.

a surrender of the estate, I have no doubt that a common law Court must necessarily hold that the landlord had waived all right to forfeiture by accepting a surrender." It is clear from those authorities that if Mr. Assheton Smith had known of the sub-letting at the time of the surrender the plaintiff would have been entitled to remain in possession notwithstanding Hamer's surrender. But it was said that if the underlessee's rights depend upon waiver, as there can be no waiver without knowledge of the facts, the landlord here had not waived his right to evict the plaintiff, for the county court judge has found as a fact that neither the landlord nor his agent had any knowledge of the sub-letting. On the other hand Mr. Montgomery has contended that no right of re-entry could be exercised after the term had been surrendered. I do not think it necessary to go that length. If the question in this case had arisen between Mr. Assheton Smith and the plaintiff, it may be that the defendant's contention would be right, and that the landlord would have been entitled, notwithstanding Hamer's surrender, to treat the plaintiff as a trespasser. The question, however, does not arise between the landlord and the plaintiff, but between the plaintiff and the person to whom the landlord has relet the premises, and that to my mind makes all the difference. The landlord did not give the plaintiff any notice that his interest was forfeited; he simply relet to the defendant; and at the time when he so relet there is nothing to shew that he knew of the plaintiff's interest. It may be said that if he had known he would hardly have relet to a new tenant without taking some steps to give him vacant possession. But there is nothing in the judge's notes to shew whether he knew or not. In those circumstances I think the plaintiff's term must be treated as still subsisting at the date of the trespass complained of. It was not put an end to by Hamer's surrender, and I do not think it could be got rid of merely by the landlord granting over his head another tenancy incompatible with his. The appeal must be allowed.

BUCKNILL J. I agree. The county court judge seems to have based his judgment upon the ground that the plaintiff as

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Bucknill J.

underlessee must be taken to have had notice of the covenants in Hamer's lease, that he must consequently have known that Hamer had no right to sub-let to him, and that his possession must have been wrongful all along; and that is clearly a mistaken view of the law. A covenant not to underlet without licence does not make an underletting in breach of that covenant illegal; it merely gives the lessor a right to re-enter. As between himself and the plaintiff the lessee allowed the plaintiff by an act which was not illegal to take possession; and the lessor did not treat that as a ground of forfeiture. He accepted a surrender from his tenant. Can he after that treat the underlessee as a trespasser? I think not. And the new tenant has, in my opinion, no greater rights than his lessor.

Appeal allowed. Leave to appeal.

Solicitors for plaintiff: *Griffiths & Roberts, for Ellis Davies, Jones & Jones, Carnarvon.*

Solicitors for defendant: *Carter, Vincent & Co., Carnarvon.*

J. F. C.

BAILEY *v.* LOWMAN.

1910
April 6, 7.

London—Carcases of Dead Horses—Receiving—Licence—Public Yard—"Yard building or other premises"—London County Council (General Powers) Act, 1903 (3 *Edw.* 7, *c. clxxxvii.*), *ss.* 53, 54.

By s. 53 of the London County Council (General Powers) Act, 1903, it is not lawful for any person to use any yard, building, or other premises within the county for receiving . . . . the carcases of dead horses unless he shall hold a licence from the council to use such yard, building, or other premises for that purpose. Any person contravening the provisions of this section is liable to a penalty:—

Held, that the words "yard building or other premises" mean yard, building, or other premises used by the accused as owner, occupier, or licensee, but do not include a public place to which he merely has access as one of the public and not otherwise.

Case stated by the magistrate of the Bow Street Police Court.

A summons was issued on the information of the respondent on behalf of the London County Council alleging that the appellant on August 11, 1909, at Long Yard, Lamb's Conduit Street, in the county of London, did unlawfully use a yard, to wit, Long Yard aforesaid, for receiving the carcases of dead horses without having obtained a licence from the said council to use such yard for that purpose, contrary to the provisions of the London County Council (General Powers) Act, 1903 (3 Edw. 7, c. clxxxvii.), s. 53. (1)

(1) The London County Council (General Powers) Act, 1903 (3 Edw. 7, c. clxxxvii.):—

Sect. 53: "(1.) From and after the passing of this Act it shall not be lawful for any person to use any yard building or other premises within the county for receiving or keeping horses for slaughter or the carcases of dead horses unless he shall hold a licence from the council to use such yard building or other premises for that purpose.

"(2.) The council may grant such licences subject to such conditions as they may think fit and every such licence shall be subject to the provisions relating to granting and otherwise for the time being in force with respect to licences for keeping or using premises within the county as a slaughter-house or knacker's yard Provided that no licence under this section shall extend to entitle the holder to carry on upon the premises in respect of which the same shall have been granted the business of a slaughterer of horses or knacker but the provisions of this section shall not be construed or deemed to

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The summons was heard by the learned magistrate on October 11, 1909, and the appellant was convicted and fined 5*l*. On the application of the appellant the following case was stated.

CASE.

The appellant is a horse slaughterer carrying on business at London Colney, near St. Albans, in the county of Hertford. He also carries on a business or businesses at Rugby Yard in Lamb's Conduit Street, London.

On August 11, 1909, an inspector of the London County Council under the Public Health (London) Act, 1891, kept observation on certain places known as Rugby Yard and Long Yard in Lamb's Conduit Street. At about 7.30 P.M. the inspector saw the appellant's van, being a special van such as is used for the conveyance of dead animals, leave the appellant's premises in Rugby Yard and drive away. The appellant's servant was driving it. At about 8.30 P.M. the same van returned laden with the carcases of two dead horses and was driven by the same servant into Long Yard. There the horses attached to the van were unyoked, and they were then led away into Rugby Yard and stabled there. The van containing the carcases of the two dead horses, covered with a tarpaulin, remained standing in Long

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prejudice or affect the right of any person for the time being lawfully carrying on any of such last-mentioned businesses to use under a licence from the council and subject to the provisions of the Public Health (London) Act 1891 premises in the county as a slaughter-house or knacker's yard.

"(3.) Any person contravening the provisions of this section or any of the conditions subject to which his licence shall have been granted shall be liable on conviction to a penalty of not exceeding fifty pounds for every such offence and to a further penalty of not exceeding fifty pounds for every day during which such offence shall continue after conviction thereof."

Sect. 54: "From and after the passing of this Act it shall be lawful for the council to make vary and amend by-laws with respect to the mode of conveying the carcases of dead horses through and along public streets in the county.

"Such by-laws shall be subject to the provisions of the Metropolis Management Act 1855 respecting the making confirmation approval publication and evidence of by-laws but the said provisions shall for the purposes of this Act be read and construed as if the Local Government Board were named therein instead of one of Her Majesty's Principal Secretaries of State."

Yard until about 10.45 P.M. Fresh horses were then harnessed to the van and it was driven away. During the time while the van was standing in Long Yard the carcases were not removed from the van or otherwise dealt with.

Rugby Yard and Long Yard lead out of the street called Lamb's Conduit Street almost opposite to each other on each side of the street. There are gates at the entrance to Rugby Yard, but no gates at the entrance to Long Yard, which is open to the public. The length of Long Yard, which is a cul de sac, is from 75 to 80 yards. There are several stables in Long Yard and some people live there. There is a public urinal situate ten yards from the entrance to Long Yard, available for the use of any members of the public who happen to be there. The police patrol Long Yard.

On these facts the magistrate came to the conclusion that Long Yard was a public place and not premises of the appellant, although there was no evidence that it had been dedicated as a street.

The magistrate found as a fact that the appellant, by leaving his van with the dead horses in it standing for two and a quarter hours in Long Yard, used Long Yard for receiving the carcases of the two dead horses.

It was admitted by the appellant that no licence had been obtained by him from the London County Council to use Long Yard for the purpose of receiving the carcases of dead horses, and that on two or three previous occasions he had used Long Yard in a similar manner, but not for so long a time.

The appellant contended (1.) that there was no evidence that Long Yard had been used by him for the purpose of receiving the carcases of dead horses as alleged in the summons, and (2.) that Long Yard was not a yard within the meaning of s. 53 of the London County Council (General Powers) Act, 1903.

The magistrate was of opinion that an offence had been committed and convicted the appellant as aforesaid.

The question for the Court was whether the learned magistrate was justified in holding that the appellant had used Long Yard for the purposes of receiving the carcases of dead horses on August 11, 1909, and in holding that Long Yard was a yard

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within the meaning of s. 53 of the Act and in convicting the appellant.

W. B. Campbell, for the appellant. Long Yard was not a "yard building or premises" within the meaning of s. 53 of this Act. Those words indicate a place which is capable of being licensed. A public place cannot be licensed and is not within the scope of this enactment. The offence consists of not getting a licence; and the section has in view private yards, buildings, or premises which might be used as a knacker's yard and which are in the possession as owner or occupier of the person receiving the carcases: *Renfrew County Council* v. *Anderson*. (1)

Secondly, there was no receiving of the carcases by the appellant in Long Yard. The van containing the carcases was merely stopping in a public place on its way to the appellant's place of business.

Daldy, for the respondent. This enactment was not passed with the main object of imposing a licence duty for the benefit of the London County Council; it is for much more general purposes; it is part of the general law of nuisances. A knacker's yard may be a serious nuisance, and so may a place used as a knacker's yard or deposit for carcases of dead horses. The object of this enactment is to prevent the use of any place, public or private, for such purposes except with the consent and under the control of the local authority. The words "yard building or other premises" are as wide and general as words can be indicating locality.

Secondly, the magistrate has found that the appellant received the carcases in Long Yard, and there is ample evidence to support that finding.

W. B. Campbell in reply.

LORD ALVERSTONE C.J. I feel considerable doubt about this case. It may fairly be contended that this enactment was intentionally framed in general terms in order that there might be a general prohibition against dealing with carcases anywhere

(1) (1899) 1 F. (J.C.) 48.

except upon licensed property. But I am not prepared to differ from my brethren, who take a strong view that the appeal ought to be allowed.

Now it was suggested that these carcases were merely in the course of transit on the occasion in question, and colour was given to this suggestion by the fact that the public have some access to Long Yard; but in my opinion it is impossible, in view of the findings of the magistrate, so to regard the delay of two and a quarter hours at that place coupled with other events which happened there, among which I am impressed with the fact that similar delays had occurred on former occasions. The magistrate thought that there was something more than merely pausing on the way, something amounting to receiving these carcases for the purpose, it may be, of forwarding them, and one can readily imagine the use of a public yard for such a purpose. The mere fact that the carcases remained in the cart in which they came is not enough to establish the necessary conclusion that there was no receiving. On the question of receiving I am therefore unable to accede to the contention of the appellant.

The second question is one of greater difficulty, namely, whether the words "to use any yard building or other premises" were intended to apply to the user of a public or quasi-public place, a place to which the public have access and over which they have a right to pass and repass. I am pressed on this question by the finding of the magistrate that Long Yard was a public place and not the premises of the appellant. Now I incline, not without doubt, to the view that this section applies to the user by persons of premises of which they have a permanent or temporary proprietary or quasi-proprietary right whether as owner or occupier of the premises or as licensee of the owner or occupier. The section does not include the abuse or improper use of the right of access which a person as a member of the public has to a public place. It is true that the appellant occupied premises in Rugby Yard which gave facilities for using Long Yard, but it does not appear that he used those premises as a knacker's yard or for any business connected with that of a knacker, and his user of Long Yard was merely as a member of the public. In my opinion such a

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user is not aimed at by s. 53. This view is supported by sub-s. 2 of that section, which prescribes the terms on which licences may be granted, and also by s. 54, which empowers the London County Council to make by-laws for regulating the conveyance of carcases through and along public streets. A proper by-law under that section might meet the present case. On the whole I am not clear that in the circumstances of this case an offence has been committed. In a criminal enactment the words constituting the offence must be clearly applicable to a given set of circumstances before in those circumstances an offence can be said to be committed. The words of this enactment do not sufficiently indicate an intention to include in the offence the receiving of carcases in a public place. The appeal must therefore be allowed.

CHANNELL J. I am of the same opinion. I confess to having shared during the argument of this case the doubts expressed by my Lord. I have come to a conclusion finally through a consideration of these two sections together. I think s. 54 was intended to deal with public places and s. 53 with private places. Sect. 53 is aimed at putting down nuisances. I do not say that a slaughter-house or knacker's yard is necessarily a nuisance, but it may be, and the Legislature empowers the London County Council to license such places so that that authority may have a control over places intended to be used for such purposes and power to provide that they shall be so used only in a locality where they may not be a nuisance and to prevent such places from being used so as to be a nuisance. In my opinion the mere fact that a certain place cannot be licensed does not of itself take such a place out of the scope of s. 53, because a place may be so improper for the purpose of receiving carcases that no one would think of licensing it for that purpose. To use such a place for that purpose might be a worse offence than to use a place which might be but was not in fact licensed. But in my view "to use any yard building or other premises" means to use as occupier or proprietor, and not to make use of the yard or premises merely as one of the public exercising a public right. Exercising or even exceeding

a public right of access to a public place would not be using a yard or premises within the meaning of this enactment. Using for this purpose means user by one who claims to be occupier, and so the yard or premises must be either a private place or some definite portion of a public place used as a private place under some claim of right by a person professing to use it for this purpose as proprietor or occupier. If that is the true view there is no evidence in this case of such a user. I am not prepared to hold that a portion of a public place may not be so used as to come within the scope of this section; but that is not the present case. In substance I think s. 53 refers to private premises. For these reasons I think this appeal must be allowed.

BRAY J. I agree. I think s. 53 contemplates the case of a man using a place as proprietor or occupier or possibly as licensee, but not as one of the public. The section speaks of "yard building or other premises," yard being mentioned first because a yard is the sort of place where carcases are usually received; then "building" is mentioned because there may be a place not properly described as a yard and yet used as a yard; "premises" is a still wider term. But all three expressions seem to me to indicate something which a man can and does occupy as his own whether by being himself the proprietor or by obtaining a right or permission from the proprietor. With regard to sub-s. 2 of s. 53 I agree it cannot be said that because this place cannot be licensed therefore it cannot be a yard; but on the other hand sub-s. 2 shews that the section contemplates a place to which a licence can be given. Sect. 54 deals with public places.

The facts in the present case shew, first, that Long Yard was a public place, and, secondly, that it was not used by the appellant as owner, occupier, or licensee of any premises, but only as one of the public. Therefore in my opinion the case does not come within s. 53. The appeal must therefore be allowed.

Appeal allowed.

Solicitors for appellant: *Clifford Turner & Hopton.*
Solicitor for respondent: *Edward Tanner.*

W. H. G

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March 21.

HOBBS *v.* WINCHESTER CORPORATION.

Local Government—Public Health—Offences—Unsound Meat—Seizure—Prosecution—Full Compensation—Costs of Prosecution—Damage to Trade and Reputation—"Exercise of powers of this Act"—Matter in which Plaintiff "not himself in default"—Mens rea—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 116, 117, 308.

By s. 116 of the Public Health Act, 1875, an inspector of nuisances may examine any meat exposed for sale and intended for the food of man, the proof that the same was not exposed for any such purpose or was not intended for the food of man resting on the party charged; and if any such meat appears to the inspector to be diseased or unsound or unwholesome or unfit for the food of man he may seize and carry away the same in order to have the same dealt with by a justice.

By s. 117, if it appears to the justice that any meat so seized is diseased or unsound or unwholesome or unfit for the food of man, he shall condemn the same and order it to be destroyed, and the person to whom the same belongs shall be liable to a penalty or to imprisonment as therein mentioned.

By s. 308, where any person sustains any damage by reason of the exercise of any of the powers of the Act in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers; and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration.

On a claim for compensation under this section an award was made which stated that the plaintiff, a butcher, delivered certain meat under a contract; the meat was rejected by the purchaser as not being in accordance with the contract. An inspector of nuisances, acting under s. 116 of the Act, inspected the meat and, being of opinion that it was diseased and unfit for the food of man, carried it away to have it dealt with by a justice. The justice ordered it to be destroyed. The inspector of nuisances then laid an information against the plaintiff under s. 117 of the Act; a summons was issued against the plaintiff and was subsequently dismissed, no order being made as to costs. A portion of the meat was in fact diseased and unfit for the food of man. The plaintiff, his servants and agents were unaware that any portion thereof was diseased or unfit for the food of man, and the fact that a portion of it was diseased and unfit for the food of man could not have been discovered by any examination which he or they could reasonably have been expected to make. The plaintiff sustained damage, namely, the costs of defending himself against the prosecution

and damage to his trade and business and character and reputation by reason of the prosecution :—

Held, that these damages were incurred in relation to a matter as to which the plaintiff was not himself in default.

Held, also, following *Walshaw* v. *Brighouse Corporation*, [1899] 2 Q. B. 286, that the damages were sustained by reason of the exercise of the powers of the Act.

TRIAL of action before Channell J. without a jury.

The action was brought by the plaintiff upon an award made under s. 308 of the Public Health Act, 1875, assessing the amount of compensation for damage alleged to have been sustained by him by reason of the exercise by the defendants of powers conferred upon them by s. 116 of the Act. (1)

Arbitrators were appointed by the plaintiff and the defendants respectively under ss. 179 and 180 of the Act to determine the questions as to the fact of damage and the amount of compensation. The arbitrators duly appointed an umpire under the same

(1) The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 116: "Any medical officer of health or inspector of nuisances may . . . . inspect and examine any animal, carcase, meat, ... exposed for sale, or deposited in any place for the purpose of sale . . . . and intended for the food of man, the proof that the same was not exposed or deposited for any such purpose, or was not intended for the food of man, resting with the party charged; and if any such animal, carcase, meat, ... appears to such medical officer or inspector to be diseased or unsound or unwholesome or unfit for the food of man, he may seize and carry away the same himself or by an assistant, in order to have the same dealt with by a justice."

Sect. 117: "If it appears to the justice that any animal carcase meat . . . . so seized is diseased or unsound or unwholesome or unfit for the food of man, he shall condemn the same, and order it to be destroyed or so disposed of as to prevent it from being exposed for sale or used for the food of man; and the person to whom the same belongs or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found, shall be liable to a penalty not exceeding twenty pounds for every animal carcase or . . . . piece of meat . . . . so condemned, or, at the discretion of the justice, without the infliction of a fine, to imprisonment for a term of not more three months . . . ."

Sect. 308: "Where any person sustains any damage by reason of the exercise of any of the powers of this Act, in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers; and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration in manner provided by this Act . . . ."

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provisions, who made his award in the form of a special case in which the following material facts were stated :—

The plaintiff was a butcher carrying on business at Southampton under the name of T. Hobbs & Co. His business consisted partly of contracts for the supply of meat to the barracks and other institutions under the War Office in the Southern Command and other public institutions, and partly of a business of retailer of meat to private persons in the ordinary way.

At the time of the occurrences in question the plaintiff held a contract with the War Office for the supply of, inter alia, ration meat at Winchester Barracks for six months from December 1, 1907, and also a further contract, dated April 30, 1908, for the supply of meat at all Salisbury Plain camps from May 16 to September 12, 1908.

Each of the said contracts provided that the beef to be supplied, if heifer or cow beef, should not be under two nor more than four years old, and that in the case of heifers and cows no portion of the udder should be cut away. They further provided for inspection of the meat by officers on behalf of the general officer commanding; for special inspection from time to time by officers holding particular qualifications as therein mentioned; for rejection of meat not in accordance with the contract; for buying in other meat in such cases against the contractor; and for fining the contractor for each occasion when meat was rejected at a special inspection. The said two contracts were terminable at any time by the Secretary of State for War by giving one month's notice to the contractor to that effect.

On May 5, 1908, the plaintiff, in pursuance of the former of the said two contracts, delivered at the Rifle Depot at Winchester Barracks two complete forequarters, one complete hindquarter, and part of the other hindquarter of the same animal.

That animal was a cow of the age of twelve years or thereabouts, and the whole of the udder had been cut away.

The meat was upon a special inspection by an officer duly qualified under the contract rejected as not being in accordance with the contract. The plaintiff was fined 10*l.* and other meat

was bought in against him, and his contract with the War Office was duly terminated as from June 18, 1908. The officer also called the attention of the medical officer of health for the city of Winchester to the said meat.

The medical officer of health, in company with the inspector of nuisances for the said city, accordingly inspected and examined the meat on the same day, when it appeared to them that the same was diseased, unwholesome, and unfit for the food of man; and they accordingly seized and carried away the same in order to have it dealt with by a justice, who, being of opinion that the meat was diseased, unwholesome, and unfit for the food of man, ordered it to be destroyed so as to prevent it from being used for the food of man.

The inspector of nuisances, acting on behalf of the corporation, laid an information under s. 117 of the Public Health Act, 1875, against the plaintiff, whereby it was alleged that on the said 5th day of May, 1908, in the said city, the said meat then in the possession of the said Tom Hobbs at the barracks aforesaid for the purpose of sale, and intended for the food of man, and then appearing to the inspector of nuisances to be unwholesome and unfit for the food of man, and the said meat being in fact unwholesome and unfit for the food of man, was lawfully seized by the inspector and afterwards on the same day adjudged by a justice to be unwholesome and unfit for the food of man and condemned by him accordingly and ordered by him to be destroyed as aforesaid. The plaintiff was duly summoned on May 12, 1908, to appear before the Court of summary jurisdiction in and for the said city to answer the said information. The plaintiff duly appeared in answer to the summons. On June 5, 1908, five justices of the city of Winchester heard and dismissed the summons, but made no order as to the costs of the prosecution.

The award of the umpire contained the following paragraphs:—

"13. A portion of the said meat so delivered on the 5th day of May, 1908, as aforesaid, that is to say, the left forequarter, at the time when the same was seized and ordered to be destroyed, was diseased and unwholesome and unfit for the food of man, but the rest of the said meat, that is to say, the right forequarter,

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the complete hindquarter, and the portion of the other hindquarter, was sound, wholesome, and fit for the food of man, and was not diseased, unsound, unwholesome, or unfit for the food of man.

"14. The said Tom Hobbs"—the plaintiff—"was unaware at the time when he delivered the said meat that any portion of the same was diseased, unsound, unwholesome, or unfit for the food of man, and so were his servants or agents who were concerned in the slaughtering, dressing, quartering, and delivery of the same. The fact that the said left forequarter was diseased, unwholesome, and unfit for the food of man could not have been discovered by any examination which he or they could reasonably have been expected to make. But the said Tom Hobbs was aware that the said meat was not in accordance with the conditions of his contract with the War Office.

"17. The said Tom Hobbs was, in fact, damaged by the cost of defending himself in the said prosecution.

"18. The said Tom Hobbs was, in fact, damaged in his trade and business generally and in his character and reputation by reason of the said prosecution.

"And I further award and determine with reference to the amount of compensation as follows:—. . . .

"21. In respect of the costs of the said Tom Hobbs in defending himself in the said prosecution the sum of 118*l.* 11*s.* 9*d.*

"23. For general damage to the said Tom Hobbs in his trade and business and his character and reputation by reason of the said prosecution the sum of 800*l.*"

Avory, K.C., and *Clarke Hall*, for the plaintiff. This case raises two questions—first, whether the offering for sale and the condemnation of this meat was a matter as to which the plaintiff was "not himself in default"; and, secondly, whether the costs of and damages arising from the prosecution were "damage by reason of the exercise of the powers of this Act" within the meaning of s. 308.

The first question depends on whether mens rea is or is not an essential part of the offence for which under s. 117 a vendor of unsound or unwholesome meat may be prosecuted. Prima facie mens rea is an essential element in every offence; that

presumption may, however, be rebutted by the provisions of a particular statute. An act may be so injurious that it is prohibited absolutely, as in *Cundy* v. *Le Cocq* (1), and *Betts* v. *Armstead* (2), a case under s. 6 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63). If the act is less injurious the prohibition may be less absolute; the act may be prohibited only if knowingly committed: *Sherras* v. *De Rutzen* (3); and the knowledge may be that of the defendant himself—*Coppen* v. *Moore* (*No.* 2) (4)—or that of his servants or agents: *Mullins* v. *Collins* (5); *Bond* v. *Evans*. (6) In these cases the burden of proving the absence of knowledge may be imposed upon the defendant or the burden of proving the presence of knowledge may be imposed upon the prosecution. The offence may be so qualified that the defendant is exempted from liability if he proves that he took all reasonable precautions against its occurrence, as in *Coppen* v. *Moore* (*No.* 2). (4) If, as in the present case, the offence is punishable by imprisonment, that is a strong indication that knowledge is an essential ingredient; it has, however, been held that a defendant may be fined for an offence under s. 117 of this Act though he did not know the meat was unsound: *Blaker* v. *Tillstone*. (7) Yet the possession of unsound meat is not absolutely prohibited; the offence consists in intending unsound meat for the food of man. By s. 116, if the defendant proves that he did not intend the meat for the food of man, that is a sufficient answer: *Wieland* v. *Butler-Hogan* (8); *Reg.* v. *Dennis* (9); but if he did not know that the meat was unsound it cannot be said that he intended unsound meat for the food of man. But even if a man is guilty of an offence under s. 117 who does not know the meat is unsound he ought not to be visited with any penalty, and certainly not with imprisonment, where, as the umpire has found in this case, not only were the defendant and his servants unaware that the meat was unsound, but the fact that it was unsound could not have been discovered

(1) (1884) 13 Q. B. D. 207.
(2) (1888) 20 Q. B. D. 771.
(3) [1895] 1 Q. B. 918.
(4) [1898] 2 Q. B. 306.
(5) (1874) L. R. 9 Q. B. 292.
(6) (1888) 21 Q. B. D. 249.
(7) [1894] 1 Q. B. 345.
(8) (1904) 73 L. J. (K.B.) 513.
(9) [1894] 2 Q. B. 458.

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by any examination which he or they could reasonably have been expected to make. In these circumstances the plaintiff cannot be said to have been "himself in default" within the meaning of s. 308.

That being so, he is entitled to the sum of 118*l.* 11*s.* 9*d.*, the costs of defending himself in the prosecution: *In re Bater and Mayor, &c., of Borough of Birkenhead* (1); *Walshaw* v. *Brighouse Corporation.* (2)

[CHANNELL J. referred to *Brierley Hill Local Board* v. *Pearsall.* (3)]

The second item of 800*l.* for general damage to the plaintiff's trade and reputation must follow the same course, as it has been found to be by reason of the prosecution.

Clavell Salter, K.C., and *E. B. Charles*, for the defendants. The plaintiff can only recover if he sustains damage (1.) by reason of the exercise of any of the powers of the Act, and (2.) in relation to a matter as to which he is not himself in default.

First, the prosecution was not an exercise of any of the powers of the Act. Sects. 10 and 11 of the Act speak of "powers rights duties capacities liabilities and obligations exerciseable by or attaching to an urban or rural authority." A power is not synonymous with a capacity. By s. 51 an urban authority may supply their district with water; by s. 154 such an authority may purchase premises for widening streets; by s. 175 any local authority may purchase lands; and by s. 183 any local authority may by by-laws impose penalties on offenders against the same. These sections may be said to confer powers, but it cannot be properly said that s. 47, for example, which subjects to a penalty any person who in an urban district keeps swine in a dwelling-house, thereby confers a power on the local authority. Similarly the examination and seizure of meat by an inspector of nuisances under s. 116 are in exercise of the powers of the Act, but not the subsequent prosecution under s. 117; anybody with the consent in writing of the Attorney-General under s. 253 may prosecute. If the prosecution were an exercise of the

(1) [1893] 2 Q. B. 77. (2) [1899] 2 Q. B. 286.
(3) (1884) 9 App. Cas. 595.

powers of the Act, the anomalous result would be that if the local authority undertake the prosecution the person sustaining damage may obtain full compensation, but if a third person prosecutes, then the person sustaining damage gets no compensation whatever. Such a result can never have been intended; it would have the effect of discouraging instead of encouraging a local authority to take proceedings.

In *Summers* v. *Holborn District Board of Works* (1) it was held that the words "all powers conferred by this Act" in s. 27 of the Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), did not include the right to proceed against a man for a penalty, and this decision was approved by the Court of Appeal in *Keep* v. *Vestry of St. Mary's, Newington.* (2)

It has never yet been expressly decided that the costs of a prosecution under s. 117 of the Public Health Act, 1875, can be recovered under s. 308 of the Act as damage by reason of the exercise of the powers of the Act. In *In re Bater and Mayor, &c., of Borough of Birkenhead* (3) the costs recovered were those of the seizure and condemnation of the meat and not the costs of any supervening prosecution. In *In re Davies and Rhondda Urban Council* (4) it was held that the costs of a subsequent prosecution were not recoverable. In *Walshaw* v. *Brighouse Corporation* (5) the Court seems to have assumed that such costs were recoverable, but there is no express decision to that effect.

Secondly, the plaintiff was "himself in default" in relation to this matter within the meaning of s. 308. The intention of these ss. 116 and 117 was to check disease by drastically checking the sale of diseased meat. Therefore the Legislature makes it an offence to have exposed for sale or deposited in a place for the purpose of sale, and intended for the food of man, any meat which is diseased or unsound or unwholesome or unfit for the food of man. The burden is imposed on the defendant to prove that the meat was not exposed or deposited for any such purpose or was not intended for the food of man. If he fails to discharge

(1) [1893] 1 Q. B. 612.
(2) [1894] 2 Q. B. 524.
(3) [1893] 2 Q. B. 77.
(4) (1899) 80 L. T. 696.
(5) [1899] 2 Q. B. 286.

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that burden he makes default; he is guilty, and if so he is in default. It has been decided that mens rea is not necessary to constitute an offence under these sections: *Mallinson* v. *Carr* (1); *Blaker* v. *Tillstone*. (2) [*Dickson* v. *Linton* (3) was also cited.]

Avory, K.C., in reply. As a matter of practice a summons by the local authority follows as a matter of course upon a condemnation of the meat. The case of *Walshaw* v. *Brighouse Corporation* (4) recognizes this practice by treating the seizure and the prosecution as different stages in the same process. The Act contemplates the local authority as the prosecutors by providing in s. 254 that half the penalty recovered shall go to the informer and the remainder to the local authority.

CHANNELL J. This is a claim for compensation under s. 308 of the Public Health Act, 1875. The first question is whether this is a matter as to which the plaintiff is "not himself in default" within the meaning of that enactment. The subject-matter with which I have to deal consists of the facts found by the arbitrator in pars. 13 and 14 of his award, which he has published, and which I am to deal with, as if it were a special case.

Upon those findings I think it is impossible to hold that there is any default on the part of the plaintiff, unless a duty is imposed upon him either by statute or at common law to ascertain at his peril that any meat delivered by him to be used for food is in fact sound and fit for food. I need not consider the cases which decide that there is an implied warranty that meat sold for food is reasonably fit for that purpose. (5) Those cases do not impose a duty as stringent as that which would bind a vendor to ascertain that meat which he offers for food is in fact sound and fit for food, and in my opinion there is no such duty imposed upon a vendor at common law. The question here is, Does this statute impose such a duty upon a person selling meat for food? If the statute imposes on a vendor the duty of finding out at his

(1) [1891] 1 Q. B. 48.
(2) [1894] 1 Q. B. 345.
(3) (1888) 15 R. (J.C.) 76
(4) [1899] 2 Q. B. 286.
(5) E.g., *Bigge* v. *Parkinson*, (1862) 7 H. & N. 955.

peril before he sells that the meat is in fact sound and fit for food, then it may be said that the plaintiff was in default, but otherwise I fail to see any default on his part. The question is in fact whether the statute involves the element of mens rea in the offence which it has created. The same question has been discussed in a considerable number of cases, and I apprehend the principle to be that, whenever a thing is made an offence, the presumption is that mens rea must be an element of it, and that, further, the presumption is that the burden of proving the existence of mens rea lies upon the prosecution. Both of these presumptions, however, are not infrequently displaced by the Legislature in modern times. For instance, under the Merchandise Marks Act, although under certain sections mens rea is an element of the offence, yet it is a matter which the prosecution is not compelled to prove, but the defendant may, if he can, prove an absence of mens rea. The case of *Coppen* v. *Moore* (*No.* 2) (1) is an example of this class of offence. There are other cases where the Legislature, desiring absolutely to prohibit certain things from being done, has done so in terms and has made the person who infringes the statute liable to punishment, at any rate in the way of a penalty, notwithstanding the fact that he himself is innocent, because there is an absolute prohibition against doing the act at all. The presumption, however, is against that being the case, and any one who desires to put that interpretation upon the statute must shew the Court a clear intention to that effect.

Now I think it is impossible to extract from s. 117 of the Public Health Act, 1875, an absolute prohibition against selling meat for food without definitely ascertaining that it is sound and fit for food. Such an enactment would oblige the vendor not only to retain an analyst, but to answer for his skill and accuracy. I can find no such prohibition in this Act, and no case has gone the length of deciding that the Act involves any such prohibition, although it is true that the cases of *Mallinson* v. *Carr* (2), *Blaker* v. *Tillstone* (3), and *Wieland* v. *Butler-Hogan* (4) seem to imply that a vendor of meat which is intended for the food of man is

(1) [1898] 2 Q. B. 306.
(2) [1891] 1 Q. B. 48.
(3) [1894] 1 Q. B. 345.
(4) 73 L. J. (K.B.) 513.

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liable to prosecution under s. 117 if the meat is in fact unsound whether he knew it to be so or not, if he fails to prove that it was not exposed or deposited for the purpose of sale or was not intended for the food of man. But neither from the Act itself nor from any decided case can I find any prohibition so absolute as to lead to the inevitable conclusion that a man offering for sale for food meat which is in fact unsound is "himself in default" within the meaning of s. 308, even though by no reasonable means could he have discovered that the meat was unsound and unfit for food. In the present case the arbitrator has negatived default on the part of the plaintiff other than the breach of his contract with the War Office. Consequently I must decide this point in favour of the plaintiff.

That brings me to the second point, namely, whether or not the damages now claimed can be recovered. The first sum claimed is a sum of 118*l.* 11*s.* 9*d.* in respect of the costs which the plaintiff has incurred in defending himself against the prosecution instituted against him under s. 117. The second is a sum of 800*l.* for general damage to the trade and business, character, and reputation of the plaintiff by reason of the prosecution. Both these sums have been found, and no doubt properly found, to have been the amount of damages occasioned by reason of the prosecution. It is to be observed that that is a different proceeding from the seizure of the meat under s. 116. It is to my mind a difficult question whether damage arising from proceedings for a penalty under s. 117 as distinguished from damage arising from the seizure of the meat under s. 116 can be said to be "damage by reason of the exercise of any of the powers of this Act" within the meaning of s. 308. If I were unaided by decided cases I should have thought that the institution of a prosecution would not be an exercise of the powers of the Act. It is true that by s. 253 of the Act the local authority may institute these proceedings without obtaining the consent in writing of the Attorney-General, as also may the party aggrieved, and that no one else can institute proceedings without such consent, and that in that respect greater facilities are given to the local authority for taking proceedings than are given to the world at large; but I should not have thought that when a

local authority were instituting a prosecution under s. 117 they were exercising a power under the Act. On this point *In re Bater and Mayor, &c., of Borough of Birkenhead* (1) is not in point, for there the only proceeding was the seizure of the meat and there was no prosecution, and the costs incurred were incurred only in resisting the condemnation of the meat. I need not deal with the case of *In re Davies and Rhondda Urban Council* (2), because there *In re Bater and Mayor, &c., of Borough of Birkenhead* (1) was not cited, and the decision is inconsistent with the judgment of the Court of Appeal delivered about a month later in the case I am next about to mention.

The case which really affects the present case is *Walshaw* v. *Brighouse Corporation* (3), where there had been a seizure and a subsequent prosecution and the summons was dismissed as it was in this case. The claim was for the costs of appearing and defending the summons. Day J. gave judgment for those costs, and that judgment was affirmed in the Court of Appeal. The result was that the plaintiff recovered the costs of defending himself against the prosecution. Mr. Macmorran, in his argument for the Brighouse Corporation, took the point that those costs did not flow from the exercise of any of the powers of the Public Health Act, 1875. That point was not expressly dealt with in the judgments of the Lords Justices, but the Court did not accede to the argument. I must follow the decision in that case. Speaking for myself, I have some difficulty in seeing the answer to the point raised. The Court of Appeal proceeded on the basis that the first act done, the seizure, was an exercise of the powers of the Act. The Court did not discuss the question whether the subsequent prosecution was also an exercise of the powers of the Act, but the judgment seems to have gone on the basis that, the prosecution being in fact connected with an exercise of those powers, it was unnecessary to consider whether the costs incurred in and about the prosecution were or were not a consequence too remote from the original seizure to constitute damage sustained by reason of the exercise of those powers.

(1) [1893] 2 Q. B. 77. (2) 80 L. T. 696.
(3) [1899] 2 Q. B. 286.

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I confess it appears to me that the prosecution need not follow the seizure. The medical officer of health or the inspector of nuisances, as the case may be, may form the opinion that the meat is unsound and unfit for the food of man, and the magistrates may form the same opinion. But the local authority may be satisfied with the vendor's explanation and refrain from prosecuting. Thus the prosecution may be regarded as a new act intervening, and, as the costs in *Walshaw* v. *Brighouse Corporation* (1) were, as they are in the present case, the result of the prosecution, it might have been held that they did not follow from the first act of seizure. But this view does not seem to have recommended itself to the Court of Appeal in *Walshaw* v. *Brighouse Corporation* (1), and I should be doing wrong if I declined to follow that case; it is for the Court of Appeal to say whether that decision is satisfactory as applied to the facts of the present case, or whether it is right to say that the doctrine of remoteness prevents the attaching of the costs of the prosecution, which is not an exercise of the powers of the Act, to the original act of seizure, which is an exercise of those powers.

There remains the larger sum of 800*l.* which the arbitrator has found to be general damage incurred by the plaintiff by reason of the prosecution. It is remarkable that so large a sum should be the consequence of an unsuccessful prosecution. But that is what the arbitrator has found. I should myself have thought that these damages also, like the costs claimed, were too remote, as they also are the consequence of the prosecution and not of the seizure; but they are on the same footing as the costs, and this point is also governed by *Walshaw* v. *Brighouse Corporation*. (1) That being so, I must hold that both these items of damage are capable of being recovered as compensation arising from the exercise of the powers of the Act, and there must therefore be judgment for the plaintiff for 918*l.* 11*s.* 9*d.*

Judgment for plaintiff.

Solicitors for plaintiff: *W. T. Ricketts & Son.*

Solicitors for defendants: *Mellor & Co., for T. Holt, Winchester.*

(1) [1899] 2 Q. B. 286.

W. H. G.

[IN THE COURT OF APPEAL.]

C. A.
1910
April 22.

In re A DEBTOR (No. 7 OF 1910).

Bankruptcy—Discovery—Interrogatories—Bankruptcy Rules, 1886-1890, *r.* 72.

The petitioning creditor in a bankruptcy petition cannot, before the hearing of the petition, obtain an order for interrogatories or discovery to prove the allegations in the petition.

APPEAL from a decision of one of the registrars.

The debtor, a married woman, carried on business apart from her husband at 33 and 34, Alfred Place, Tottenham Court Road, as a costume manufacturer, under the styles of John & Co., Russell & Co., and the Parisienne Pleating Company.

On November 7, 1909, a limited company was incorporated under the name of W. O. Russell & Co., Limited, to take over her business, and by an agreement dated November 11 between the debtor and the company the debtor agreed to sell the stock in trade and goodwill of the business and her interest in the business premises to the company for 14,990*l.*, to be paid in fully paid up shares of the company.

On December 24, 1909, the petitioning creditors, J. T. & J. Taylor, Limited, obtained a judgment in the King's Bench Division against the debtor for 248*l.* for goods sold and delivered and 10*l.* for costs.

On January 15, 1910, they presented a bankruptcy petition against the debtor, alleging as the act of bankruptcy that on November 11, 1909, she made a fraudulent conveyance or transfer of her property. The allegations in the petition were verified by an affidavit in the usual form made by the secretary of the company. The debtor gave notice of her intention to dispute the act of bankruptcy.

On January 21, 1910, the registrar, upon an ex parte application of the petitioning creditors under r. 72 of the Bankruptcy Rules, 1886-1890 (1), made an order against the debtor for

(1) Rule 72: "Any party to any proceeding in Court may, with the leave of the Court, administer interrogatories to, or obtain discovery of documents from, any other party to such proceeding. Proceedings under

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discovery and interrogatories, which were wanted for the purpose of proving the act of bankruptcy.

On February 23, upon the application of the debtor, he discharged his previous order, being of opinion that, inasmuch as bankruptcy proceedings were of a penal nature, no order for discovery or interrogatories ought to be made against her.

The petitioning creditors appealed.

The appeal came on for hearing before the Master of the Rolls and Buckley and Kennedy L.JJ., and after the appeal had been argued at some length it was on April 16 adjourned for argument before the full Court.

E. Clayton, K.C., and *F. Mellor*, for the appellants. The effect of the registrar's decision is to refuse interrogatories and discovery in limine, and the ground of his decision is that proceedings in bankruptcy are in the nature of an action for penalties.

The application of the petitioning creditors was made under r. 72 of the Bankruptcy Rules, 1886–1890. By that rule "any party to any proceeding in Court may with the leave of the Court administer interrogatories to, or obtain discovery of documents from, any other party to such proceeding." "Proceeding in Court" in that rule includes a proceeding before the registrar in chambers: see Bankruptcy Act, 1883, s. 99, sub-s. 1; rr. 3 (*a*), 10, 11. Where Court is distinguished from chambers the term "open court" is used.

[*Hansell*, for the respondents. In r. 9 the word "court" alone is used as distinguished from chambers.]

Upon the question of the application of the rule (72) the registrar was in favour of the appellants. Rule 72 was new in 1883, and that Act made a very substantial difference in proceedings in bankruptcy. A man may now petition against himself, and a receiving order is different from an adjudication; it does not affect the debtor's status or divest his property. The relevance

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this Rule shall be regulated as nearly as may be by the Rules of the Supreme Court for the time being in force in relation to discovery and inspection. An application for leave under this Rule may be made *ex parte*."

of the application for interrogatories and discovery is to ascertain what are the circumstances relating to the transaction complained of, e.g., whether any consideration was given for the transfer. That is a matter which is peculiarly within the debtor's knowledge and which cannot be within the knowledge of the petitioning creditors.

[Farwell L.J. The petitioning creditors have sworn that the statements in the bankruptcy petition are true within their knowledge, and then they ask the Court to enable them to make good what they have sworn to.]

Proceedings in bankruptcy have no analogy to an action for penalties. The object of an action for penalties is not compensation to the plaintiff for some loss he has sustained, but punishment of the defendant for an offence, and the amount of the payment is measured by the gravity of the defendant's conduct. In bankruptcy proceedings the creditor can recover nothing which is not due to him; the most that he can recover is 20*s.* in the pound plus interest.

[Farwell L.J. referred to Daniell's Chancery Practice, 5th ed., p. 481, and to *Harrison* v. *Southcote.* (1)]

That case depended upon forfeiture, and there is no forfeiture in bankruptcy. *In re X. Y.* (2) supports the appellants' contention.

[Fletcher Moulton L.J. That case has nothing to do with getting discovery before the hearing of the petition.]

It may be said that the answers to some of the interrogatories might tend to incriminate the debtor, but that is not a ground for refusing interrogatories in limine : *Derby Corporation* v. *Derbyshire County Council.* (3) The act of bankruptcy alleged does not necessarily involve moral fraud or moral turpitude, and the fact that a charge of fraud is made in an action and no particulars given is not a ground for refusing discovery : *Leitch* v. *Abbott* (4) ; and see Story on Equity Jurisprudence, vol. 2, s. 1500.

Hansell, for the respondents, was not called upon.

Vaughan Williams L.J., who at the request of the Master of the Rolls gave the first judgment, said : I think that

(1) (1751) 1 Atk. 528.
(2) [1902] 1 K. B. 98.
(3) [1897] A. C. 550.
(4) (1886) 31 Ch. D. 374.

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this appeal ought to be dismissed. The question we have to determine turns upon the meaning of r. 72 of the Consolidated Bankruptcy Rules, 1883 and 1886. The words of r. 72 are these: [The Lord Justice read the rule, and continued.] We have heard a discussion as to the meaning of the words "in court." However, taking the view which I do of this case, I do not propose to deliver a judgment as to the meaning of those words. This is a case in which the registrar, who has written an excellent judgment, has exercised his discretion, and it is not disputed but what the registrar had a discretion whether he would make the order or not. I begin by saying that I see no reason whatsoever for disputing or interfering with the discretion he has exercised. But I wish to go further than this, and, although I agree with most of the reasons that were given by the learned registrar, I will give one or two reasons myself why the order for discovery and interrogatories should not be made in the present case. Therefore it is convenient that I should first point out at what stage these proceedings are at the present time. There has been an affidavit filed as to which I shall have to say a few words in a moment, but it is an affidavit which in effect is an affidavit for the purpose of getting leave to file a petition in bankruptcy. It is not so called, but that it is so in substance is quite plain. The affidavit which is used at the time when the petition is filed is an affidavit which cannot be used upon the hearing of the bankruptcy petition. So, that being the time at which this application is made, I think it is rather convenient to call attention to the form which is sworn to, which form I am told by the judgment of the registrar is the form habitually used, in the present claim. The form is Form 12 in the Appendix to the Rules and is as follows.

It is headed "Affidavit of Truth of Statements in Petition." Then comes the title of the bankruptcy. Then it proceeds: "I the petitioner named in the petition hereunto annexed make oath and say:—1. That the several statements in the said petition are within my own knowledge true." Then there is this note: "If the petitioner cannot depose that the truth of all the several statements in the petition is within his own knowledge he must set forth the statements the truth of

which he can depose to, and file a further affidavit by some person or persons who can depose to the truth of the remaining statements." The registrar, having referred to this Form 12 and read the words "The several statements in the said petition are within my own knowledge true," says "That statutory form must often put a tax upon the consciences of creditors but is usually adopted, and the provisions of rules 150–152 providing for the evidence of other persons at this stage are not often utilized." That is rather a shocking statement. Here is a precise and clear direction that when these matters which it is intended to prove are not within the knowledge of the deponent he has to get those persons within whose knowledge they are to make an affidavit in addition to his own affidavit, and the learned registrar says that although this form of affidavit must often be putting a tax on the conscience of the deposing creditor, yet he generally, so to speak, accepts the tax and swears to the truth of something as being within his own knowledge that he knows perfectly is not within his own knowledge. I think that this habit should be discouraged. What has been done is this. This creditor who has sworn to facts which are not within his own knowledge then goes to the registrar and says "I wish to prove the facts that I swear I know, and for that purpose I ask you to make an order for discovery and interrogatories so that I may prove the truth of those facts which at present I have not proved." If there were nothing more in the case than that, that would I think be a substantial reason why in the exercise of his discretion the registrar should have refused this application. But r. 72 itself says "Proceedings under this rule shall be regulated as nearly as may be by the Rules of the Supreme Court for the time being in force in relation to discovery and inspection." Let us consider for a moment what would happen if this was an action in the High Court. I put the filing of the petition on the same basis as the issue of the writ in the action. Then we have this: Writ in the action, a general statement of claim alleging a fraudulent conveyance or any other fraud, no particulars, no defence, and an application for an order for discovery or interrogatories, it does not matter which. I can only say that according to the Rules

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of the Supreme Court, as a rule, no order at that stage could be made, and in my opinion it is of the utmost importance to consider that in the sections of the Bankruptcy Act and in the Bankruptcy Rules it is always recognized that anything in the nature of discovery and anything in the nature of examination of the bankrupt is something which must take place not before the receiving order is made, as in this case, but after the receiving order has been made. So far as my experience goes I have not only never known of an order for discovery or interrogatories to assist the petitioner in proving the allegations in his bankruptcy petition, but in addition to that the provisions of s. 27 and the other provisions of the Act whether for discovery or for the examination of the debtor relate to proceedings which have to be taken after a receiving order has been made and not before. It is really, speaking of the common law proceeding, as if a plaintiff who had got no judgment but hoped he might get a judgment applied for an order for the examination of the defendant touching his or her property before he brought in his judgment. In my opinion no such order as this asked for has ever been made in bankruptcy; nor, taking the analogous stage in common law proceedings, would it have been made at common law. I ought to say something about the decision in *In re X. Y.* (1) I have nothing to detract from my own judgment nor do I wish to depart from anything that was said by my colleagues in that case. But that was a decision which is wholly inapplicable here. The question there was simply this: Upon the hearing of a bankruptcy petition can the bankruptcy petitioner call the debtor as a witness? For a great many years in the administration of bankruptcy this had never been allowed, and the decision in that case was so far a departure from the old practice; but the law of evidence in civil proceedings had always in modern times allowed a litigant to call his opponent as a witness. The opponent, of course, was called subject to his right if any question was put to him which had a tendency to incriminate him—and I think the rule extended sometimes to incriminating his wife—to refuse to answer, but subject to that the opponent might be

(1) [1902] 1 K. B. 98.

called. In the case of *In re X. Y.* (1) it was contended that that rule as to the admissibility of evidence had no application to bankruptcy proceedings because bankruptcy proceedings were in the nature of criminal proceedings. We came to the conclusion that the proceedings in bankruptcy could not properly be treated as criminal proceedings. We based our decision upon the ground, amongst others, that a bankruptcy petition had for some years past been a proceeding of which an insolvent man might avail himself to get his estate administered in bankruptcy with all the powers which are incidental to such administration. That decision does not to my mind touch what we have to deal with here. The sole question there was whether we should trench upon the existing law as to the admissibility of evidence. Here what is asked for is that the Court should exercise a discretion and make an order for discovery and for interrogatories. I think that the judgment of the learned registrar is quite right and that this appeal should be dismissed with costs.

COZENS-HARDY M.R. I am of the same opinion. I only wish to add one remark. I think it is very important that it should be put beyond doubt that the form of affidavit given in Form 12 certifying the creditor's petition is not to be used in support of every petition in bankruptcy, because in many cases it must be absolutely impossible that an affidavit in that form can be made without involving perjury. When you remember that many acts of bankruptcy involve a particular intent, such as departing out of England or beginning to keep house, it is quite impossible that any man could truly swear that it was within his own knowledge that that was the debtor's intention. The petitioner in all such cases should confine himself to stating the facts which are true to his knowledge, and from which he draws that inference.

FLETCHER MOULTON L.J. I agree with what has been said by my brothers, but I wish to add one thing. In my opinion the principles on which discovery and interrogatories have been

(1) [1902] 1 K. B. 98.

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allowed in actions in the High Court shew that when the real issue is of a penal nature neither discovery nor interrogatories will be allowed. Now proceedings in bankruptcy are of course not actions, but in my opinion what the petitioner seeks by his petition is in the highest degree penal in its consequences. It amounts to loss of civil status carrying with it grave disqualifications, and the principles which in actions have guided the Court in giving or refusing discovery in the High Court appear to me to apply with special force to proceedings in bankruptcy, and shew that we ought not here to allow either discovery or interrogatories.

FARWELL L.J. I am of the same opinion. I only desire to say that in this particular instance the learned registrar might well have said to the applicant "You do not come here with clean hands. You have sworn that to your knowledge the debtor has made a fraudulent transfer of her property and you base your present application for discovery on the ground that you cannot otherwise prove the truth of this statement." Further, I agree with Fletcher Moulton L.J. that an adjudication of bankruptcy involves very grave disqualifications. Under s. 32 of the Bankruptcy Act, 1883, a bankrupt cannot sit in the House of Lords or House of Commons, he cannot act as a justice of the peace, he cannot be a mayor or a guardian of the poor or a select vestryman. I think it plain that the registrar is justified in taking all those consequences into consideration before he exercises his discretion.

BUCKLEY L.J. I agree on the ground that proceedings in bankruptcy are in the nature of penal proceedings inasmuch as they result or may result in an alteration of the debtor's status.

KENNEDY L.J. I agree. I have nothing to add.

Appeal dismissed.

Solicitors for appellants: *Jaques & Co., for J. H. Wilman, Batley.*

Solicitors for respondent: *Raphael & Co.*

H. B. H.

In re JOHN TWEDDLE & COMPANY, LIMITED.

1910
April 7.

Company—Winding-up—Official Receiver and Liquidator—Report alleging Fraud—Public Examination of Person charged—Person exculpated from Charge—Jurisdiction to order Official Receiver to pay Costs personally—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 8.

A company having been ordered to be wound up in a county court, the official receiver, who was the liquidator, in his further report to the Court under s. 8, sub-s. 2, of the Companies (Winding-up) Act, 1890, stated that in his opinion the facts set out therein constituted a fraud committed in the promotion or formation of the company, and also in relation to the company since its formation, and that the persons named in the schedule to the report were parties to the fraud. Among the persons so named was the respondent, a director of the company. Upon this report the county court judge made an order under sub-s. 3 for the public examination of the persons named. After the public examination the respondent applied to the judge for an order exculpating him from the charge of fraud, and the judge made an order exculpating him, and directing the official receiver personally to pay to the respondent the costs of his examination and of the application, there being no available assets of the company :—

Held, that the order for payment of the costs by the official receiver personally must be discharged—

By Darling J., upon the ground that, as the official receiver made his further report in performance of a duty imposed upon him by the Act, and as he performed that duty honestly and without any misconduct, the county court judge had no jurisdiction to order him personally to pay the costs.

By Bucknill J., upon the ground that in those circumstances the county court judge, even if he had jurisdiction, ought not to have made the order.

By Darling J.: Sect. 8, sub-s. 7, of the Act, which provides that if the person examined is, in the opinion of the Court, exculpated from the charge "the Court may allow him such costs as the Court in its discretion may think fit," only applies where there are assets of the company available for the payment of costs.

Appeal from the Newcastle-upon-Tyne County Court.

A company entitled John Tweddle & Company, Limited, was registered on June 1, 1906, under the Companies Acts, the company being formed for the purpose of acquiring the business of ironfounders, plumbers, and stone grate merchants, which had previously been carried on under the style of John Tweddle &

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Company. The registered office of the company was at Newcastle-upon-Tyne, and the nominal capital was 20,000*l.*, of which less than 10,000*l.* was issued and fully paid up. Upon May 21, 1908, the company was ordered to be wound up in the Newcastle-upon-Tyne County Court, and on July 6, 1908, the official receiver as the liquidator of the company made a preliminary report upon the affairs of the company under s. 8, sub-s. 1, of the Companies (Winding-up) Act, 1890 (1), and on September 25

(1) 53 & 54 Vict. c. 63, s. 8:

"(1.) Where the Court has made an order for winding up a company, the official receiver shall, as soon as practicable after receipt of the statement of the company's affairs, submit a preliminary report to the Court—

"(*a*) as to the amount of capital issued, subscribed, and paid up, and the estimated amount of assets and liabilities; and

"(*b*) if the company has failed, as to the causes of the failure; and

"(*c*) whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company, or the conduct of the business thereof.

"(2.) The official receiver may also, if he thinks fit, make a further report, or further reports, stating the manner in which the company was formed and whether in his opinion any fraud has been committed by any person in the promotion or formation of the company, or by any director or other officer of the company in relation to the company since the formation thereof, and any other matters which in his opinion it is desirable to bring to the notice of the Court.

(3.) The Court may, after consideration of any such report, direct that any person who has taken any part in the promotion or formation of the company, or has been a director or officer of the company, shall attend before the Court on a day appointed by the Court for that purpose, and be publicly examined as to the promotion or formation of the company, or as to the conduct of the business of the company, or as to his conduct and dealings as director or officer of the company.

"(4.) The official receiver shall take part in the examination, and for that purpose may, if specially authorized by the Board of Trade in that behalf, employ a solicitor with or without counsel.

"(5.) . . . .

"(6.) The Court may put such questions to the person examined as to the Court may seem expedient.

"(7.) The person examined shall be examined on oath, and it shall be his duty to answer all such questions as the Court may put or allow to be put to him. The person examined shall at his own cost prior to such examination be furnished with a copy of the official receiver's report, and shall also at his own cost be entitled to employ at such examination a solicitor with or without counsel, who shall be at liberty to put such questions to the person examined as the Court may deem just for the purpose of enabling that person to

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following he made a further report under sub-s. 2, which he concluded by stating that he was of opinion that the facts set out in the report constituted a fraud committed in the promotion or formation of the company and also in relation to the company since the formation thereof, and that the persons named in the schedule thereto were parties to such frauds. Certain directors of the company were named in the schedule, among them being the respondent Easten. The official receiver applied to the county court judge to fix a day for the consideration of the report, and the judge, having considered the report, ordered a public examination of the persons so named. After the public examination Easten applied to the judge for an order exculpating him from the charge of fraud made against him in the report, and the county court judge made an order exculpating Easten, stating that he was satisfied after having heard Easten's evidence that he was in no way guilty of any fraud ; he also made an order that the official receiver should pay to Easten the costs of his public examination and of the application. It was admitted that the company had no available assets out of which the official receiver could reimburse himself the costs so ordered to be paid, and the effect of the order was, as the judge intended, that the official receiver would have to pay the costs personally.

The official receiver appealed against so much of the order as directed him to pay the costs.

Sir W. S. Robson, A.-G., and *Hansell*, for the official receiver. The county court judge intended by his order that the official receiver should personally pay the costs of the respondent in connection with his public examination and his application

explain or qualify any answers given by him. Provided always that if such person is, in the opinion of the Court, exculpated from any charges made or suggested against him, the Court may allow him such costs as the Court in its discretion may think fit . . . ."

The Companies (Winding-up) Act, 1890, has been repealed by s. 286 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), but the above provisions of s. 8 of the Act have been re-enacted in ss. 148 and 175 of the Act of 1908. By s. 287 of this latter Act, where the winding-up of a company has commenced before the commencement of the Act of 1908, namely, April 1, 1909, the Act of 1908 shall not apply, but for the purposes of winding up the Act or Acts under which the winding-up commenced shall be deemed to remain in full force.

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to be exculpated from the charge of fraud made against him, and that is the effect of the order inasmuch as the company has no assets out of which the official receiver can reimburse himself the costs which he has been ordered to pay. In the absence of misconduct on the part of the official receiver there is no jurisdiction to order him to pay costs where he simply performs his statutory duty as an officer of the Court. There is no suggestion here that the official receiver has been guilty of any misconduct or breach of duty. Upon the evidence before him he honestly reported that in his opinion there were grounds for alleging fraud in the formation of the company upon the part of certain persons, including the respondent Easten. By s. 8, sub-s. 1, of the Companies (Winding-up) Act, 1890, the official receiver "shall" make a preliminary report, and by sub-s. 2 he may, if he thinks fit, make a further report or further reports, stating the manner in which the company was formed, and whether in his opinion any fraud has been committed by any person in the promotion or formation of the company or by any director or other officer of the company in relation to the company since the formation thereof. By sub-ss. 3 and 4 the Court may, after consideration of the report, direct a public examination of any such person, and the official receiver "shall take part in the examination." An order for a public examination is therefore an order of the Court and not of the official receiver, and the examination is not a litigation, though the official receiver is bound by the Act to attend it. By the proviso in sub-s. 7, if such person is exculpated from any charges made or suggested against him, the Court "may allow him such costs as the Court in its discretion may think fit." This latter provision does not give the Court a general discretion to allow costs as against the official receiver, where the latter has been guilty of no misconduct or impropriety, but merely gives the Court power to allow costs out of the assets of the company. The Companies (Winding-up) Rules, 1903 (1), made under the Act, prescribe in detail the duties of the official receiver in

(1) Rules 62—70 of the Companies (Winding-up) Rules, 1903, have now been replaced by rr. 59—67 of the Companies (Winding-up) Rules 1909, which are in the same terms as the former rules.

making a report under s. 8 of the Act. Rule 62 directs him to state in a narrative form the facts and matters which he desires to bring to the notice of the Court, and his opinion as required by the section. By r. 63 the official receiver may apply to the Court to fix a day for the consideration of the report, and on such application the Court shall appoint a day for its consideration. By r. 64 the consideration of the report shall be before the judge personally in chambers, and the official receiver shall attend and give the Court any further information or explanation with reference to the matters stated in the report which the Court may require. Upon that the judge may or may not order a public examination. The official receiver does not bring the person against whom fraud is alleged into Court. The Court can only order a public examination of a person where it appears from the official receiver's further report that in his opinion a fraud has been committed by that person in connection with the company: *Ex parte Barnes.* (1) If in his opinion a case of fraud on the part of any such person is established by the facts before him it is his judicial duty to make a further report: *Ex parte Barnes* (2); *Burr* v. *Smith.* (3) An official receiver has a statutory duty under the Act of 1890 to inquire in a judicial way into certain matters and to make a report to the Court, and in performing that duty he is acting in a judicial capacity, and his report made under s. 8, sub-s. 2, of the Act is absolutely privileged: *Bottomley* v. *Brougham* (4), a case which was approved in *Burr* v. *Smith.* (5) The official receiver in making his reports and in performing the duties consequential thereon is performing a duty imposed upon him by statute, and so long as he has been guilty of no misconduct the Court has no jurisdiction to order him to pay costs. If he has been guilty of any misconduct, no doubt the Court has inherent jurisdiction to order him to pay costs: *In re Raynes Park Golf Club* (6); but misconduct is not alleged here. The case of *In re Hounslow Brewery Co.* (7) is not against the

(1) [1896] A. C. 146.
(2) Ibid. at pp. 150, 154.
(3) [1909] 2 K. B. 306, at p. 314.
(4) [1908] 1 K. B. 584, at p. 587.
(5) [1909] 2 K. B. 306.
(6) [1899] 1 Q. B. 961.
(7) [1896] W. N. 45. The Attorney-General read from the shorthand notes of the judgment in that case.

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appellant's contention, because in that case the official receiver acted improperly in objecting to the application to discharge the order for public examination though his report did not contain an allegation that a fraud had been committed by some person, which, according to the decision of the House of Lords in *Ex parte Barnes* (1), it should have contained in order to support an order under s. 8, sub-s. 3, for a public examination. In that case the official receiver went beyond his statutory duty and acted as a litigant in opposing the application, which he ought not to have done in view of the decision in *Ex parte Barnes* (1) which had then been pronounced, and therefore the Court ordered him to pay the costs personally. That case is not in point. The county court judge, therefore, had no jurisdiction to order the official receiver to pay the costs personally.

Gore-Browne, *K.C.*, and *Lowenthal*, for the respondent Easten. When an official receiver has made a further report under s. 8, sub-s. 2, of the Companies (Winding-up) Act, 1890, he applies to the Court under r. 63 of the Companies (Winding-up) Rules, 1903, to fix a day for the consideration of the report, and if in that report there is a charge of fraud against one of the persons specified in s. 8, sub-s. 2, of the Act, the Court may upon consideration of the report direct a public examination of the person so charged. If an order for a public examination is made the official receiver applies to the Court to fix a day for holding it (r. 66 and form 32 in the Appendix to the Rules), and by r. 67 the official receiver is to give notice of the time and place appointed to the person who is to be examined; and by r. 69, if that person fails to attend and no good cause is shewn by him for such failure, the Court may issue a warrant for his arrest. By s. 8, sub-s. 4, of the Act the official receiver "shall take part in the examination," and for that purpose may employ a solicitor with or without counsel, if authorized by the Board of Trade to do so. The official receiver is therefore the person who sets the machinery of the Court in motion and who in practice conducts the examination. Neither the creditors of the company nor the persons charged with fraud can prevent the examination from being held.

(1) [1896] A. C. 146.

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If the official receiver desires to examine an officer of the company under s. 115 of the Companies Act, 1862, he must first tender him his expenses, whereas no tender of expenses is required in the case of a public examination under the Act of 1890. When Lord Herschell in *Ex parte Barnes* (1) pointed out that under s. 8, sub-s. 7, of the Act, if the persons are exculpated, "the Court can, and doubtless will, give them their costs," he must have meant as against the official receiver, who under the analogous s. 115 of the Companies Act, 1862, would have to tender the expenses to the person whom he wishes to have examined before being entitled to examine him. It is as reasonable to order the official receiver to pay the costs in such a case as to allow them to be paid out of the assets of the company. The official receiver is not left without a remedy, because he can apply, in a case where the company has no assets, under r. 186 (now r. 203 of the Companies (Winding-up) Rules, 1909) for directions to the Board of Trade before incurring any expense, and if he follows their directions he will be protected from ultimate personal liability. The trend of the decisions is to order the official receiver, who is the liquidator, to pay the costs where the proceedings which he has taken are unsuccessful: Buckley on the Companies Acts, 9th ed. p. 731. In *In re Paraguassu Steam Tramroad Co., Ferrao's Case* (2), the official liquidator of a company was ordered to pay the costs of an unsuccessful application to have a person placed on the list of contributories and of an appeal against the dismissal of the application, the Court of Appeal stating that the rule would be to order the liquidator to pay the costs of an appeal in similar cases, whether he did or did not get them out of the estate. In *In re Powell & Sons* (3) Romer J. refused to order the official receiver and liquidator to give security for the costs of a misfeasance summons against certain officers of the company upon the ground that the Court had jurisdiction at the hearing to order him to pay the costs personally; and in *In re Western Counties Steam Bakeries and Milling Co.* (4) the Court of Appeal ordered the official receiver and

(1) [1896] A. C. at p. 155.
(2) (1874) L. R. 9 Ch. 355.
(3) [1896] 1 Ch. 681.
(4) [1897] 1 Ch. 617, at p. 632.

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liquidator to pay the costs of a misfeasance summons. Again, in *In re Hounslow Brewery Co.* (1) Vaughan Williams J. ordered the official receiver personally to pay the costs of a successful application to discharge an order made under s. 8 of the Companies (Winding-up) Act, 1890, for the public examination of a person named in his report; and in *In re Great Kruger Gold Mining Co.* (2) the Court ordered the official receiver to pay the costs of a successful appeal against the refusal of the judge to discharge an order for a public examination under the same section. In none of those cases was there any suggestion of misconduct on the part of the liquidator or official receiver. There is no case where it has been laid down that the jurisdiction to order an official receiver to pay costs depends upon misconduct on his part. Sect. 8, sub-s. 7, of the Act empowers the Court to allow the person who is exculpated from the charge of fraud his costs, and that must be as against the official receiver, who is the only other party to the proceedings, and who is described by Vaughan Williams J. in *In re Hounslow Brewery Co.* (1) as a litigant, leaving the official receiver to reimburse himself out of the assets of the company. In *Bottomley* v. *Brougham* (3) Channell J. held that the report of the official receiver under s. 8, sub-s. 2, of the Act of 1890 was absolutely privileged, but he did not decide that there was any privilege attaching to the position of the official receiver in the proceedings subsequent to the report; and he said (4) that "it is perhaps not quite accurate to say the official receiver is in any sense a litigant"—that is to say, in making his report—"but when he comes before the winding-up Court upon the examination no doubt he is, in one sense, a party to the proceedings; he is, as it were, appearing for the prosecution." Therefore the official receiver is not in the position of a judge, but is in the position of a litigant in the proceedings subsequent to the report, and as such can be ordered to pay the costs of those proceedings. The element of misconduct arises upon the question whether the official receiver is entitled to be reimbursed out of the assets of the company the costs which he has incurred and which he has been ordered

(1) [1896] W. N. 45.
(2) [1892] 3 Ch. 307, at p. 328.
(3) [1908] 1 K. B. 584.
(4) Ibid. at p. 589.

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to pay. In *In re Raynes Park Golf Club* (1) Wright J., in saying that an order against the official receiver to pay costs personally is tantamount to a declaration that he has been guilty of misconduct, only meant that the official receiver was in the wrong in what he did. The official receiver being in the position of a litigant or party can be ordered to pay the costs. The Companies (Winding-up) Rules, 1903, recognize the general jurisdiction of the Court to order the official receiver to pay costs personally, because where it is intended to relieve him from that liability the rules expressly say so, as in r. 118 (now r. 114 of the Companies (Winding-up) Rules, 1909), which says that "the official receiver shall in no case be personally liable for costs in relation to an appeal from his decision rejecting any proof wholly or in part." In such a case he is clearly acting as a judge, and upon that ground he is relieved from liability to pay costs. In other cases he is not so relieved. The county court judge therefore had jurisdiction to order the official receiver to pay the costs personally, and the order was rightly made.

Hansell in reply. Where the official receiver acts in the capacity of a litigant, as, for instance, where he initiates misfeasance proceedings against directors or officers of the company for the purpose of increasing the assets of the company, or where he has been guilty of misconduct in any steps he may have taken, he may be ordered to pay the costs. But where he merely performs in a proper manner a duty imposed upon him by statute he is not liable to pay costs. The official receiver here has only performed his duty in making the report to the Court. Though he thus set the machinery of the Court in motion, he did so in his judicial capacity as an officer of the Court, and not as a litigant. In *In re Great Kruger Gold Mining Co.* (2) the point was not taken; and in *In re Bolton & Co.* (3), where the official receiver opposed an application by certain persons to have their names struck off the list of contributories and succeeded, but an appeal from the decision was allowed with costs, the Court held that the applicants were only entitled to costs out of the assets of the company and not against the official

(1) [1899] 1 Q. B. 961. (2) [1892] 3 Ch. 307, at p. 328.
(3) [1895] 1 Ch. 333.

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receiver personally. With reference to r. 186, that rule only provides that the official receiver shall not be required to incur any expense where the company has no available assets, and therefore has no application to the performance by him of his statutory duty.

DARLING J. In my opinion this appeal must succeed. The question, which is not free from difficulty, arises upon the construction of certain sections of the Companies (Winding-up) Act, 1890. The county court judge has made an order directing the official receiver to pay the costs of the respondent Easten upon an application by the latter to exculpate himself from the charge of fraud made against him in the report of the official receiver under s. 8, sub-s. 2, of the Companies (Winding-up) Act, 1890, and as the company which is being wound up has no assets, a fact which the county court judge well knew when he made the order, the order is equivalent, and was intended by the judge to be equivalent, to an order against the official receiver to pay the costs personally.

Under s. 8, sub-s. 1, of the Companies (Winding-up) Act, 1890, the official receiver has a duty to make a first report, called a preliminary report, to the Court, but upon that report a public examination does not follow. Then by sub-s. 2, "The official receiver may also, if he thinks fit, make a further report, or further reports, stating the manner in which the company was formed and whether in his opinion any fraud has been committed by any person in the promotion or formation of the company, or by any director or other officer of the company in relation to the company since the formation thereof, and any other matters which in his opinion it is desirable to bring to the notice of the Court." No doubt the sub-section does not in express words impose an obligation upon the official receiver to make a further report, but it is clear from the case of *Ex parte Barnes* (1) that if he comes to a judicial conclusion that certain facts have been proved it is his duty to make a further report. That is made clear from the judgment of the Lord Chancellor (Lord Halsbury) at p. 149, where he says "That preliminary report was to

(1) [1896] A. C. 146

contain 'the amount of capital issued, subscribed, and paid up, and the estimated amount of assets and liabilities.' That was an actual duty cast upon the official receiver. If the company had failed he was to report 'as to the causes of the failure,' and whether, in the opinion of the official receiver, 'further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company, or the conduct of the business thereof.' So far there seems to be no difficulty, and no necessity for further exposition of the object and meaning of the legislation that was then arrived at. But then there came what seems to me to be an absolutely independent and separate set of provisions, and that was that, if the official receiver thought fit, he was to make a further report. The expression, 'if he thinks fit,' must of course mean if he arrives at a judicial conclusion in his own mind that such facts are before him, and in proof, that it becomes his duty. It is left to him to do it if he thinks fit; it is not made necessary for him to do it in every case, but only in such cases as in his judgment demand such a course to be pursued." The Lord Chancellor then proceeded to read sub-s. 2, which I have just read. It seems to me the Lord Chancellor there laid it down that the Act casts upon the official receiver an absolute duty to make a first or preliminary report, and that with regard to a further report there is an absolute duty imposed upon him to make such a report if he has arrived at the judicial conclusion that there are such facts before him as require him to make a further report. The expression "if he thinks fit" does not leave the matter to his absolute discretion to do as he likes in each case, but it imposes the duty upon him to make the report if he has come to the judicial conclusion that certain facts have been proved before him. The official receiver thereupon makes the further report, and that is all that he does. He makes the report in the discharge of his statutory duty. Cases have been referred to on behalf of the respondent which shew that where an official receiver has made himself a litigant in any proceedings he may be ordered personally to pay the costs of those proceedings where he has been unsuccessful. That is not contested. What one has to inquire—and this is the real question in the case—is whether the official receiver did

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anything here which made him subject to the rule imposing upon him liability to pay costs as a litigant; whether he was acting merely as an official receiver discharging his statutory duty, or whether he was acting as an official receiver who had adopted the attitude of a litigant. In my opinion the official receiver did not in this case do anything whatever as a litigant; he simply did that which it was his duty to do—namely, to make a further report—when he had come to the judicial conclusion that there were facts before him on which to found such a report. If he acts as official receiver merely discharging the duties cast upon him by the Act, he cannot be ordered to pay costs unless in the discharge of those duties he is guilty of some personal misconduct; and by the word "misconduct" I mean some real personal misconduct in doing something which is blameworthy. In the case of *In re Raynes Park Golf Club* (1) Wright J. said that to visit an official receiver with an order to pay costs personally was tantamount to a declaration that he had been guilty of misconduct, and so far that case seems to be an authority in favour of the contention of the official receiver. With regard to the case of *In re Hounslow Brewery Co.* (2), I do not think that it has any application to the present case, because upon the facts there it is clear that the official receiver was not merely discharging a statutory duty, but was undertaking to do that which only a litigant would do; he was doing that which the official receiver should not have done; and that was the reason why an order to pay costs was made against him personally. In the present case I cannot find that the official receiver did anything but that which he was bound by the Act to do. He had nothing to do with the order for the public examination. His duty was discharged when he had made his report and brought it before the Court. When the judge had the report of the official receiver before him he had to act upon his own judgment as to whether the case was one in which he ought to make an order for a public examination. He might have come to the conclusion that the materials before him were not sufficient foundation for such an order. The public examination which followed was ordered by the judge, and when the official receiver attended the public examination he did so in pursuance of the

(1) [1899] 1 Q. B. 961. (2) [1896] W. N. 45.

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obligation imposed upon him by s. 8, sub-s. 4, of the Act. His taking part in the examination was not an act of volition as a litigant, but it followed necessarily from the order of the judge and the provisions of the Act. That being so, there was, in my opinion, no jurisdiction to order the official receiver to pay the costs.

I desire to add a few words with reference to the contention founded upon s. 8, sub-s. 7, of the Companies (Winding-up) Act, 1890. I do not think that such an order as this comes within the language of that enactment. The material words of that sub-section are these: "Provided always that if such person is, in the opinion of the Court, exculpated from any charges made or suggested against him, the Court may allow him such costs as the Court in its discretion may think fit.' That provision seems to me to contemplate a case in which there are assets of the company out of which the costs can come, and not a case in which there are no assets. I cannot think that the words "may allow him such costs" are words which the Legislature would have used if it had intended that they should apply as against an officer of the Court who is guilty of no misconduct and who is performing a quasi-judicial act, although the Court, upon hearing all the evidence, may come to the conclusion that the view which that officer took in his report is not the correct view. If the Legislature had intended that, it would have used very different words. It may be quite reasonable that the Court in such a case should allow the party exculpated his costs if there are assets to pay them; but if there are no assets, I think that as between two persons, neither of whom has been in fault, it is not right or proper to subject a public official, who is performing a public duty and who discharges that duty to the best of his ability, to the risk of having to pay costs. To subject the official receiver to such a liability might unduly fetter him in the discharge of his statutory duties, and might have a tendency to render the discharge of those duties less efficient.

For these reasons I think that the appeal should be allowed.

BUCKNILL J. I agree in the conclusion arrived at by my brother, though I have had during the argument considerable

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doubt. It is an appeal from an order of the county court judge directing that, upon proceedings under s. 8 of the Companies (Winding-up) Act, 1890, a person against whom a charge of fraud was made and who was exculpated therefrom should have his costs, and it is clear that the judge intended that the order should be effective against the official receiver personally, there being no assets out of which the costs can be paid. If it had been established that the official receiver was a litigant in those proceedings or had done something from which it could properly be inferred that he was acting as a litigant, I think that we should be bound to hold, as was held in *In re Hounslow Brewery Co.* (1), that he might properly be made to pay the costs personally. As I understand the case of *In re Hounslow Brewery Co.* (1), the decision amounted to this. In that case the official receiver was termed a litigant, and he was said to be in fault. He had made a preliminary report under s. 8, sub-s. 1, of the Companies (Winding-up) Act, 1890, and a further report under s. 8, sub-s. 2, and in the latter report he did not allege fraud against some person. The Court having made an order, under sub-s. 3 of the Act, for the public examination of the persons named in the report, before the examination took place the House of Lords decided in *Ex parte Barnes* (2) that the Court had no jurisdiction to direct any person to be publicly examined under s. 8, sub-s. 3, unless the further report of the official receiver, made under sub-s. 2, contained an allegation of fraud against the person whom it was proposed to examine. Application was thereupon made to the Court to discharge the order for the public examination, and this application was opposed by the official receiver, when he ought to have acquiesced in it, and that constituted him a litigant, and the Court upon those facts ordered him to pay the costs of the application personally. Each case must depend to a certain extent upon its own facts, and those facts seem to me to differentiate that case from the present one.

Many cases have been cited to us, one being the case of *In re Powell & Sons* (3), which at first gave me a little trouble. In

(1) [1896] W. N. 45. (2) [1896] A. C. 146.
(3) [1896] 1 Ch. 681.

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that case a misfeasance summons was taken out by the official receiver and liquidator of a company under s. 10 of the Companies (Winding-up) Act, 1890, against certain officers of the company, and as the company had not any available assets for the payment of costs, the respondents to the misfeasance summons applied that the official receiver should give security for their costs on the summons. Romer J., who heard the application, said: "I desire to express my opinion that a liquidator who initiates proceedings of this class is at the mercy of the Court as regards being ordered to pay costs at the hearing of the misfeasance summons. This Court undoubtedly has jurisdiction in a case like that to order a liquidator personally to pay costs, and in my opinion the Court would do so in any case where it would be just that the liquidator should be ordered to pay the costs. And I think that the Court, in considering whether the liquidator ought or ought not to be ordered to pay the costs personally, would have regard to the fact that an application for an order that he should give security for costs had been made and had been opposed, and that the Court had refused to order security for costs on the ground that there would be jurisdiction at the trial to order him to pay them. It is on that ground and on that ground alone that I refuse in the present case to order the liquidator to give security for costs." That decision, however, when carefully considered, does not touch this case. In that case the official receiver initiated the misfeasance proceedings against the officers of the company and therefore placed himself in the position of a litigant seeking to recover certain moneys alleged to belong to the company. There was no statutory duty imposed upon him to take those proceedings. In the present case the official receiver has merely performed a statutory duty cast upon him of making a further report to the Court under s. 8, sub-s. 2, of the Act. I come now to the case of *In re Raynes Park Golf Club* (1), where Wright J. said that to order the official receiver personally to pay the costs of a motion launched against him was tantamount to a declaration that he had been guilty of misconduct, and that there was no evidence of any such misconduct; and he therefore held that there was no

(1) [1899] 1 Q. B. 961.

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ground for ordering the official receiver personally to pay the costs. That decision apparently proceeded upon the ground that the official receiver was merely acting as an officer of the Court.

In my opinion this general principle can be gathered from the authorities, that where an official of the Court acts only as such official in a matter in which he is bound to act, then, unless in the steps which he takes in carrying out the duty so imposed upon him there is some misconduct on his part, as a general rule, even if the Court has jurisdiction to order him personally to pay the costs, such an order ought not to be made. In other words, he ought not to be punished for doing that which the statute has declared it to be his duty to do.

With regard to the two reports of the official receiver, s. 8, sub-s. 1, of the Act of 1890 enacts that "where the Court has made an order for winding up a company, the official receiver shall . . . . submit a preliminary report to the Court." Therefore the statute makes it obligatory upon him to make that preliminary report. Then by sub-s. 2, "The official receiver may also, if he thinks fit, make a further report." The word is "may," not "shall." The official receiver has therefore to exercise some judgment in the matter. He has to consider the facts so far as he can ascertain them, and if upon the facts which he is able to ascertain he arrives honestly at the conclusion that a fraud has been committed by some person in the promotion or formation of the company, or by any director or other officer of the company in relation to the company since the formation thereof, he is bound to make the further report to the Court so that the Court may in the exercise of its discretion consider whether a public examination of the person or persons implicated by the report should be held. I have said that he is bound to make that further report, because it would be a neglect of duty on his part if, having before him facts which in his opinion justify a charge of fraud, he omitted to make the report. When he makes the report, he does not do so in any sense as a litigant, but as an officer of the Court in the performance of a public duty. He submits the report to the Court, and applies to have a day fixed for its consideration, and upon consideration of the report the Court may make an order for the public examination of the

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person implicated. That is all that the official receiver did in the present case. It is admitted that he acted properly and honestly. The Court, having ordered a public examination of the person charged with fraud, found after hearing all the evidence that he was not guilty, and exculpated him from the charge and made an order that the official receiver should pay his costs personally. In every step which the official receiver took he acted as an official and not as a litigant, and he acted honestly; he was bound as a matter of public duty to make the further report to the Court, and although the allegations which he made in the report were not substantiated when the Court heard all the evidence, yet in the circumstances the Court ought not to have made the order that he should pay the respondent's costs personally. I wish to guard myself against saying that the Court has no jurisdiction to make such an order. I hesitate to go so far as that. I think that the order was one which in the circumstances ought not to have been made.

Appeal allowed.

Solicitor for appellant: *Solicitor to Board of Trade.*

Solicitors for respondent: *Worthington Evans, Dauney & Co., for Mather & Dickinson, Newcastle-upon-Tyne.*

W. F. B.

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April 15.

SHENSTONE & CO. *v.* FREEMAN.

Landlord and Tenant—Distress—Protected Goods—"Goods comprised in hire purchase agreement"—"Possession, order, or disposition"—Reputed Ownership—Law of Distress Amendment Act, 1908 (8 *Edw.* 7, *c.* 53), *s.* 4.

Sects. 1 and 2 of the Law of Distress Amendment Act, 1908, protect under certain conditions from distress the goods of under-tenants, lodgers, and other persons not being tenants and not having any beneficial interest in any tenancy of the premises.

By s. 4 the Act is not to apply to goods . . . . comprised in any bill of sale, hire purchase agreement, or settlement made by the tenant, nor to goods in the possession, order, or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant is the reputed owner thereof.

The defendant, a broker distraining for rent due to a landlord from his tenant, seized a pianoforte let by the plaintiffs to the wife of the tenant on a hire purchase agreement in consideration of monthly payments and on the terms that, in case of default in the punctual payment of the monthly sums, the plaintiffs might retake possession of the piano. At the date of the seizure the monthly payments were in arrear. The plaintiffs performed the conditions specified in ss. 1 and 2 of the Act. The defendant detained the piano.

On appeal from a county court in an action for illegal distress:—

Held, that the words "hire purchase agreement" in s. 4 mean hire purchase agreement to which the tenant is a party, and therefore that the piano was not "comprised in any hire purchase agreement" within the meaning of that section; that on the facts there was no evidence that the piano was in the possession, order, or disposition of the tenant by the consent and permission of the plaintiffs under such circumstances that the tenant was the reputed owner thereof; and consequently that the piano was not within the exception made by s. 4 to the protection conferred by ss. 1 and 2, and that the defendant was liable.

Appeal from the Lambeth County Court.

One D. C. Wyard was the tenant of a house in Southwark Bridge Road.

In or about September, 1909, rent being due from and unpaid by D. C. Wyard in respect of the house, the defendant, a bailiff, distrained on behalf of the landlord and seized a pianoforte which he found in the house. This pianoforte had been let by the plaintiffs to Edith Wyard, the wife of D. C. Wyard, by a hire purchase agreement in writing dated May 15, 1909, upon the terms that she should pay 1*l.* 1*s.* on the execution of the

agreement and the further sum of 10*s.* 6*d.* per month, the first of the monthly payments to be made on June 15, 1909. In case of default in the punctual payment of the monthly sum, and in other events not material to this case, the plaintiffs were empowered immediately and without notice to terminate the hiring and retake possession of the piano. Under this agreement Mrs. Wyard paid 1*l.* 1*s.* on the execution thereof and one monthly payment of 10*s.* 6*d.* on July 14, 1909, and no more. The plaintiffs made a demand for the instalments in arrear; by a mistake of a clerk in their office this demand was addressed to D. C. Wyard and not to Mrs. Wyard. When the defendant distrained he did not see Mrs. Wyard, and was informed that she was not then living on the demised premises.

On October 20, 1909, the plaintiffs served on the defendant a declaration under s. 1 of the Law of Distress Amendment Act, 1908 (1), to the effect that the immediate tenant of the premises

(1) Law of Distress Amendment Act, 1908 (8 Edw. 7, c. 53), s. 1.: "If any superior landlord shall levy, or authorise to be levied, a distress on any furniture, goods, or chattels of—

"(*a*) any under tenant liable to pay by equal instalments not less often than every actual or customary quarter of a year a rent which would return in any whole year the full annual value of the premises or of such part thereof as is comprised in the under tenancy, or

"(*b*) any lodger, or

"(*c*) any other person whatsoever not being a tenant of the premises or of any part thereof, and not having any beneficial interest in any tenancy of the premises or of any part thereof,

for arrears of rent due to such superior landlord by his immediate tenant, such under tenant, lodger, or other person aforesaid may serve such superior landlord, or the bailiff or other agent employed by him to levy such distress, with a declaration in writing made by such under tenant, lodger, or other person aforesaid, setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods, or chattels so distrained or threatened to be distrained upon, and that such furniture, goods, or chattels are the property or in the lawful possession of such under tenant, lodger, or other person aforesaid, and are not goods or live stock to which this Act is expressed not to apply; and also, in the case of an under tenant or lodger, setting forth the amount of rent (if any) then due to his immediate landlord, and the times at which future instalments of rent will become due, and the amount thereof, and containing an undertaking to pay to the superior landlord any rent so due or to become due to his immediate landlord, until the arrears of rent in

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had no right of property or beneficial interest in the piano and that the piano was the property of the plaintiffs. The defendant nevertheless detained the piano.

On October 25, 1909, the plaintiffs brought an action in the county court for the return of the piano on the ground, as alleged in the particulars of claim, that the defendant had illegally distrained on the same contrary to the terms of the Law of Distress Amendment Act, 1908. Alternatively they claimed damages for illegally continuing a distress on the same and for illegally detaining the same and wrongfully converting it to the defendant's own use. They claimed a return of the piano or 19*l.*, its value.

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respect of which the distress was levied or authorised to be levied have been paid off, and to such declaration shall be annexed a correct inventory, subscribed by the under tenant, lodger, or other person aforesaid, of the furniture, goods, and chattels referred to in the declaration; . . . ."

Sect. 2: "If any superior landlord, or any bailiff or other agent employed by him, shall, after being served with the before-mentioned declaration and inventory, and in the case of an under tenant or lodger after such undertaking as aforesaid has been given, and the amount of rent (if any) then due has been paid or tendered in accordance with that undertaking, levy or proceed with a distress on the furniture, goods, or chattels of the under tenant, lodger, or other person aforesaid, such superior landlord, bailiff, or other agent shall be deemed guilty of an illegal distress, and the under tenant, lodger, or other person aforesaid, may apply to a justice of the peace for an order for the restoration to him of such goods, and such application shall be heard before a stipendiary magistrate, or before two justices in places where there is no stipendiary magistrate, and such magistrate or justices shall inquire into the truth of such declaration and inventory, and shall make such order for the recovery of the goods or otherwise as to him or them may seem just, and the superior landlord shall also be liable to an action at law at the suit of the under tenant, lodger, or other person aforesaid, in which action the truth of the declaration and inventory may likewise be inquired into."

Sect. 4: "This Act shall not apply—

"(1.) to goods belonging to the husband or wife of the tenant whose rent is in arrear, nor to goods comprised in any bill of sale, hire purchase agreement, or settlement made by such tenant, nor to goods in the possession, order, or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant is the reputed owner thereof, nor to any live stock to which section twenty-nine of the Agricultural Holdings Act, 1908, applies; . . . ."

The case came on for hearing in the county court on December 13, 1909. The county court judge took the view that the piano was by s. 4 of the Law of Distress Amendment Act, 1908, excepted from the immunity from distress conferred by ss. 1 and 2, because it was, as he held, in the possession of D. C. Wyard by the consent and permission of the plaintiffs under such circumstances that D. C. Wyard was the reputed owner. He therefore gave judgment for the defendant.

The plaintiffs appealed.

Simon, K.C., and *Schwabe*, for the appellants. There was no evidence on which the county court judge could find that this piano was "in the possession, order, or disposition of" the tenant "by the consent and permission of the true owner under such circumstances that" the tenant "was the reputed owner thereof." Those words have been the subject of many decisions, having been adopted into this Act from a number of Bankruptcy Acts from 21 Jac. 1, c. 19 (1623), to the present time. First, this piano was not in the possession of the tenant, D. C. Wyard. It was in the possession of Mrs. Wyard: *Ramsay* v. *Margrett*. (1) Even if it was in the possession of D. C. Wyard, it was not in his possession with the consent of the plaintiffs; and it was not in his possession under such circumstances that he was the reputed owner thereof. It is a well-known usage of trade to let out pianos on the terms that the property remains in the owner until the hirer pays all instalments due. It has been said that "the doctrine of reputed ownership is a doctrine which ought in particular trades to be carefully watched and ought not to be extended, and the moment it is found that creditors ought not to rely upon the fact that goods are in the possession of their debtor, the Court ought to be strict in saying that the property of one man shall not go to pay the debts of another": per Brett M.R., *Ex parte Reynolds, In re Barnett* (2); Williams, Bankruptcy Practice, 9th ed. pp. 243—245. A piano let on a hire purchase agreement was in *In re Blanshard, Ex parte Hattersley* (3), held not to be in the order and disposition

(1) [1894] 2 Q. B. 18. (2) (1885) 15 Q. B. D. 169, at p. 191.
(3) (1878) 8 Ch. D. 601.

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of the hirer within the meaning of s. 15 of the Bankruptcy Act, 1869.

The other exceptions from the immunity are (1.) goods belonging to the husband or wife of the tenant—those words are inapplicable to this piano—and (2.) goods comprised in any bill of sale, hire purchase agreement, or settlement made by the tenant; in the present case the hire purchase agreement was not made by the tenant. Therefore the exceptions from immunity do not apply; the piano was immune from distress, and the defendant is liable: *Lowe* v. *Dorling*. (1)

Atkin, K.C., and *Gutteridge*, for the respondent. There was evidence on which the county court judge could come to the conclusion that this piano was in the possession of D. C. Wyard. A demand was made on him as being in possession, and he never disclaimed a right to possession; when the defendant called at the house Mrs. Wyard was found not to be living there; the instalments were in arrear, and therefore it cannot be said that the possession of the piano was in accordance with the terms of the hire purchase agreement; it was therefore in the possession of D. C. Wyard with the consent of the plaintiffs: see *Simmons* v. *Edwards*. (2) The only remaining question is whether the possession was under such circumstances that D. C. Wyard was the reputed owner. The county court judge has answered that question in the affirmative, and this Court will not reverse his decision on a question which has always been a question for a jury: *In re Blanshard, Ex parte Hattersley*. (3) Nearly every kind of possession is some evidence of ownership: Williams, Bankruptcy Practice, 9th ed. p. 241.

Secondly, this piano was comprised in a hire purchase agreement, and therefore by s. 4 of the Act the immunity from distress does not apply to it. The words "made by the tenant" in s. 4 apply only to "settlement" and do not qualify "bill of sale" or "hire purchase agreement." A settlement is properly spoken of as being made; a bill of sale is usually spoken of as being granted, and a hire purchase agreement as being entered into. It is not a usual expression to speak of an agreement

(1) [1906] 2 K. B. 772. (2) (1847) 16 M. & W. 838.
(3) 8 Ch. D. 601.

made by a person when what is meant is an agreement to which the person is a party. A hire purchase agreement might be said to be "made by such tenant" if the tenant was the letter out of the subject-matter of the agreement, but not where he is the hirer. The policy of s. 4 is to extend no protection to persons who by allowing their goods to remain in the possession of others enable those others to exhibit a fictitious appearance of substance and solvency.

Schwabe in reply. If the construction put upon s. 4 by the respondent is correct a lodger since the passing of this Act is in a worse position than he was under the Lodgers' Goods Protection Act, 1871 (34 & 35 Vict. c. 79). This can never have been intended by the Legislature.

DARLING J. The difficulty in this case is caused by the language of an Act of Parliament which is so drawn that it may be construed quite logically in at least two different ways. One must give a fair meaning to the words and attribute a reasonable effect to the enactment. In the words of Farwell L.J. in *Lowe* v. *Dorling* (1), "Acts of Parliament are not, in my experience, expressed with such accuracy and precision as to justify the Court in striking out unambiguous words in order to make a sentence grammatical or logical."

This Act was intended to amend the law as it remained after the passing of the Lodgers' Goods Protection Act, 1871. To clear away immaterial facts and contentions and come to the essential point, I think that the piano, which had been let out on a hire purchase agreement by the plaintiffs to Mrs. Wyard, was, in the words of s. 1 of the Law of Distress Amendment Act, 1908, "the property of" the plaintiffs, and was not, in the words of s. 4, goods comprised in any hire purchase agreement made by the tenant, because the person who made the hire purchase agreement was Mrs. Wyard, and she was not the tenant. As to whether the piano was in the possession, order, or disposition of the tenant, Mr. Wyard, by the consent and permission of the true owner in such circumstances that Mr. Wyard was the true owner thereof, I do not think that it was in his possession, though

(1) [1906] 2 K. B. 772, at p. 784.

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I am not disposed to say that there was absolutely no evidence that it was in his possession. But granting for the sake of argument that it was in Mr. Wyard's possession, I do not think there was any evidence that it was in his possession, or in his order or disposition, by the consent or permission of the plaintiffs; and even if there was evidence of that, there was no evidence that it was so in such circumstances that Mr. Wyard was the reputed owner thereof. That clears away every contention except that which arises on s. 4. The words of that section are "This Act shall not apply to goods . . . . comprised in any bill of sale, hire purchase agreement, or settlement made by such tenant . . . ." It is said that those words mean goods comprised in any settlement made by such tenant, or in any bill of sale or hire purchase agreement, whether the tenant is or is not a party thereto; that the words "made by such tenant" qualify the word "settlement" but do not qualify the words "bill of sale" or "hire purchase agreement." But in my view the words "goods comprised in any hire purchase agreement" mean any hire purchase agreement to which the tenant is a party. Take the case of a person who has hired a motor car on a hire purchase agreement, a friend, it may be, invited, or a medical man sent for, to visit a house, the tenant of which owes his rent; if the landlord puts in a distress, could the motor car be seized? I do not think so. I do not think it was the intention of the Legislature that it should be seized in such circumstances, notwithstanding that the words of this enactment are capable of conveying that intention. I cannot believe that in an Act designed to extend the benefit of the Lodgers' Goods Protection Act, 1871, it was intended to subject a casual visitor at a house, the rent of which was unpaid, to the liability of having his property seized merely because he came with property over which he had granted a bill of sale or which he had obtained on a hire purchase agreement. It cannot concern either the landlord or the tenant whether the goods of a third person brought on to the demised premises are or are not the subject-matter of a bill of sale or hire purchase agreement. If the debt secured by the bill of sale in the one case, or all the instalments under the hire purchase agreement in the other, have

been paid, no one suggests that the property could then be seized; but it is argued that if the property happens to be the subject of a subsisting bill of sale or hire purchase agreement, then the landlord may distrain it. I do not think that was the intention of the Legislature. I do not say that the case is clear, because the words of s. 4 are grammatically capable of conveying that intention. They can also be read as expressing the intention contended for by the plaintiffs, a construction which attributes to the enactment the more reasonable effect, as I think. For these reasons this appeal must be allowed.

BUCKNILL J. I am of the same opinion. This action is brought against a bailiff for the illegal seizure of a piano the property of the plaintiffs; the piano was seized under a distress for rent due not from the person who had hired the piano, but due from her husband. As to the facts there is no dispute. The plaintiffs let out this piano to the tenant's wife on a hire purchase agreement which provided that in case of default in the punctual payment of the monthly instalments the plaintiffs might retake possession of the piano. The hirer only paid one instalment and so was in default, and the plaintiffs were entitled to retake possession. The plaintiffs made a demand on the husband for payment, but that was explained as having been through an error of a clerk in their employment and I attach no importance to this point. There was some evidence that when the defendant called at the house the tenant's wife was not at that time living there, but that is not enough to establish that the wife had transferred possession of the piano to her husband.

I come now to the history of this legislation. In the year 1871 the Lodgers' Goods Protection Act was passed. It has been repealed by the Act of 1908. On comparing ss. 1 and 2 of the earlier Act with ss. 1 and 2 of the later Act, I do not think it was intended by the later Act to put lodgers in a position worse than that which they held after the earlier and before the later Act was passed. If the Legislature had had any such intention assuredly much clearer language would have been used. The Act of 1908 introduced two other classes of persons, namely, under-tenants and other persons not being tenants of the

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premises and not having any beneficial interest in any tenancy of the premises. I think these two classes were intended to be placed in the same position in which lodgers were placed by the Act of 1871. If a superior landlord distrains now on any goods of an under-tenant as described in the Act, or any lodger, or any other person as described above for arrears of rent due to the superior landlord by his immediate tenant, such under-tenant, lodger, or other person may serve the superior landlord with a declaration setting forth that the immediate tenant has no right of property or beneficial interest in the goods distrained upon and that the goods are the property or in the lawful possession of the under-tenant, lodger, or other person; in the case of an under-tenant or lodger the declaration must set forth the amount of rent (if any) due to his immediate landlord and must contain an undertaking to pay to the superior landlord any rent due or to become due to the immediate landlord; and the declaration must contain an inventory, subscribed by the under-tenant, lodger, or other person, of the goods referred to in the declaration. When the superior landlord or his bailiff or agent has been served with the declaration and inventory, and after an under-tenant or lodger has paid or tendered the amount of rent due from him in accordance with his undertaking, the goods become immune from distress; and if the landlord, his bailiff or agent, levy or proceed with a distress, he is to be deemed guilty of an illegal distress. Then, as under the Act of 1871, an application may be made to a justice of the peace for restoration of the goods; the application is to be heard by a stipendiary magistrate or two justices, who may inquire into the truth of the declaration and inventory and make such order as shall seem just, and the superior landlord and his bailiff (see *Lowe* v. *Dorling* (1)) are liable to an action for illegal distress. The present case is an example of such an action.

Now there are certain goods which, even if all the above formalities have been duly observed, are nevertheless excluded from the benefit of ss. 1 and 2 of the Act of 1908. These goods are those described in s. 4 and classed under two sub-sections. With the second sub-section we are not now concerned.

(1) [1906] 2 K. B. 772.

Sub-s. 1 mentions three descriptions of goods to which the immunity is not to extend—first, goods belonging to the husband or wife of the tenant whose rent is in arrear; the object of this exception was clearly to discourage transactions of a dishonest character which may easily be imagined; secondly, goods comprised in any bill of sale, hire purchase agreement, or settlement made by the tenant; and, thirdly, goods in the possession, order, or disposition of the tenant by the consent and permission of the true owner under such circumstances that the tenant is the reputed owner.

Now the goods in question in this case did not belong to the wife of the tenant and do not therefore come within the first class. Neither do they come within the third class, because there is no evidence of any consent or permission of the plaintiffs, the true owners, that the goods should be, if they ever were, in the possession, order, or disposition of the tenant under such circumstances that he was the true owner thereof. Those words have had a well-known meaning from the year 1623 to the present time—see 21 Jac. 1, c. 19, s. 11—and there are no facts in the present case which would justify the inference that they were applicable to the piano in question.

It only remains to consider whether the piano was comprised in any bill of sale, hire purchase agreement, or settlement made by the tenant. On this part of the case I adopt the argument for the plaintiffs. If the words were to be read as the respondent contends, lodgers would now be in a worse position than they were before the Act was passed. I prefer to read the words "made by such tenant" as applicable not only to "settlement" but also to "bill of sale" and "hire purchase agreement." For these reasons I think this appeal should be allowed.

Appeal allowed.

Solicitor for appellants: *H. E. Tudor.*
Solicitors for respondent: *Foulger, Robinson & Miller.*

W. H. G.

C. A.

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April 13; *May* 10.

[IN THE COURT OF APPEAL.]

BAMFIELD *v.* GOOLE AND SHEFFIELD TRANSPORT COMPANY, LIMITED.

Carrier—Dangerous Goods—Common Carrier—Absence of Notice of Danger to Carrier—Implied Warranty by Consignor that Goods are not dangerous—Duty of Consignor to inform Carrier of Nature of Goods.

The defendants delivered to the plaintiff's husband, who was the owner of a keel, for carriage thereon, by him, as a common carrier, a quantity of a chemical called ferro-silicon, packed in casks. Ferro-silicon is sometimes under certain conditions a dangerous substance from its liability to give off very poisonous gases. The ferro-silicon was delivered by the defendants to the plaintiff's husband as before mentioned under the description of "general cargo," and he was not informed by them and did not know that it was ferro-silicon. In consequence of the ferro-silicon so shipped on the plaintiff's husband's keel giving off poisonous gases, the plaintiff's husband died, and the plaintiff, who was on board the keel with him assisting in its management, was rendered seriously ill. At the trial of an action brought by the plaintiff in her own right, and also as administratrix of her husband, to recover damages in respect of her illness and of pecuniary loss occasioned by her husband's death, it appeared that the defendants knew, when they shipped the casks, that they contained ferro-silicon, but it was found by Walton J., who tried the case without a jury, that they did not know, and he did not find that negligence could be imputed to them in respect of not knowing, that ferro-silicon was dangerous:—

Held, affirming the judgment of the learned judge, that the action was nevertheless maintainable.

By Vaughan Williams L.J.: It was, on the shipment of such an article as ferro-silicon, the duty of the defendants to communicate to the plaintiff's husband such information as they had as to the nature of the article which they were shipping on his keel, and, therefore, to describe it, not as general cargo, but by the name of ferro-silicon, and by reason of neglect of that duty they were liable.

By Fletcher Moulton L.J. and Farwell L.J.: Where a consignor who delivers goods to a common carrier, for carriage by him in performance of his common law obligation to carry, does not give notice to the carrier that the goods are dangerous, he must, unless the carrier knows, or ought to know, the dangerous character of the goods, be taken impliedly to warrant that the goods are fit for carriage in the ordinary way, and not dangerous.

Brass v. *Maitland*, (1856) 6 E. & B. 470, and *Acatos* v. *Burns*, (1878) 3 Ex. D. 282, discussed.

Appeal from the judgment of Walton J. in an action tried by him without a jury.

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BAMFIELD
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The action was brought by the plaintiff, who was the widow and administratrix of one William Moxon Bamfield, to recover damages from the defendants in respect of an illness from which she had suffered, and of pecuniary loss occasioned by the death of her husband, under the following circumstances. The plaintiff's husband, who was the owner of a keel, carried on business as a common carrier of goods. The plaintiff used to assist him in working the keel. The defendants, who carried on business as carriers and forwarding agents, on the Aire and Calder Navigation, delivered to the plaintiff's husband, for carriage by him as a common carrier by canal from Goole to Sheffield in his keel, a quantity of a chemical known as "ferro-silicon," packed in casks. It appeared that it was so delivered to the plaintiff's husband under the description of "general cargo," and that he was not informed by the defendants that it was ferro-silicon, of which fact they were aware. During the carriage of the ferro-silicon from Goole to Sheffield on the plaintiff's husband's keel it gave off poisonous gases, in consequence of which the plaintiff's husband died, and the plaintiff, who was on board the keel with her husband, was rendered seriously ill. The ferro-silicon, which was consigned by merchants in Germany to Sheffield, had been brought by a steamer belonging to the Lancashire and Yorkshire Railway Company to Goole, and the defendants, who had contracted with the railway company for its transport thence to Sheffield, had entered into a sub-contract with the plaintiff's husband as a common carrier for such transport, under which sub-contract the ferro-silicon had been delivered by the defendants to the plaintiff's husband as before mentioned.

By the indorsement on the writ the plaintiff claimed, alternatively, for breach of contract, or for negligence or breach of duty. The statement of claim alleged that the defendants shipped on board the plaintiff's husband's boat at Goole for carriage therein to Sheffield certain closed casks of goods, described by them as scrap or general cargo; that the said casks did not contain scrap or general cargo, and in fact contained a substance known as ferro-silicon, as the defendants knew, or ought to have known, but of which the plaintiff and her husband were ignorant; that the plaintiff's husband accepted the said

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casks for carriage in the belief induced by the defendants' said description that they contained general cargo; that ferro-silicon was a dangerous substance by reason of its giving off poisonous gases; and that it was the duty of the defendants, before shipping the said goods on board the plaintiff's husband's keel, to give notice to the plaintiff and her husband of what they consisted and of their dangerous character. Alternatively it was alleged that the defendants knew, or ought to have known, or had the means of knowing, of what the said goods consisted, and of their dangerous character, and it was their duty, before shipping the same, to give notice thereof to the plaintiff and her husband. The statement of claim then proceeded to allege that the defendants, wrongfully and in breach of their duty, or, alternatively, negligently and in breach of their duty, shipped the said goods on board the said boat for carriage as aforesaid packed so as to permit of the formation and escape of the said poisonous gases, and without giving any notice either to the plaintiff or her husband, and, by reason of the said failure to give such notice, and of the ignorance of the plaintiff and her husband of the true nature and character of the said goods, the plaintiff and her husband permitted the said goods to be loaded on board and carried in the said boat as aforesaid. Then followed averments of the damage.

The learned judge found, as the result of the evidence, that, though most ferro-silicon did not, under any conditions to which it would ordinarily be exposed in carriage, give off dangerous gases, still some ferro-silicon did under certain ordinary conditions to which it might be exposed either in a keel on a canal, or in a ship at sea, give off very poisonous gases, and, therefore, that, though ferro-silicon might or might not be dangerous, still it was always liable to be dangerous, and in that sense a consignment of ferro-silicon was a dangerous substance, and calculated to do damage. He found that the plaintiff's husband did not know that the goods which he received from the defendants were dangerous, and that no negligence could be imputed to him in respect of his not knowing that they were dangerous. The learned judge further found that the defendants did not in fact know that ferro-silicon was dangerous, and, with regard to the

allegation that they ought to have known that it was dangerous, he was of opinion that, if it were necessary for him to arrive at a conclusion as to that, he should not, though the question was not an easy one, find, upon the evidence, that there was any negligence on the part of the defendants in not knowing that the ferro-silicon was dangerous, or that knowledge that it was dangerous ought to be imputed to them. He was, however, of opinion that, upon the authority of the judgment of the majority of the Court in *Brass* v. *Maitland* (1), there was an implied undertaking under the circumstances existing in the case before him on the part of the defendants that the goods delivered to the plaintiff's husband for carriage were such as might safely be carried and not of a dangerous nature, and he therefore gave judgment for the plaintiff for 150*l.* damages in respect of her own illness, and 175*l.* damages for the pecuniary loss occasioned by the death of her husband.

The defendants appealed, and the plaintiff gave a cross-notice of intention to contend that the learned judge ought, on the evidence, to have found that the defendants were guilty of negligence in not knowing that the ferro-silicon was dangerous, as they had reasonable means of so knowing.

E. T. Atkinson, K.C., and *W. H. Owen*, for the defendants. There is really no authority for the general proposition that the shipper of goods warrants that they are not dangerous, if he does not give notice to the shipowners that they are so. *Brass* v. *Maitland* (1) does not, when examined, appear to be an authority for that proposition. The questions dealt with in that case arose on demurrer to pleas, and the counts to which those pleas were pleaded alleged knowledge of the dangerous character of the goods shipped on the part of the shippers, and ignorance of the character of the goods on the part of the shipowners. The cause of action alleged in the first count in that case was that the defendants, knowing the character of the goods, and that they would be dangerous, if insufficiently packed, shipped them improperly packed in casks which outwardly appeared to be sufficient, but were really insufficient. The second count alleged

(1) 6 E. & B. 470.

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that the defendants, knowing the dangerous character of the goods, shipped them without giving notice of the danger to the plaintiffs, who were ignorant of it. Neither of those counts would be applicable to the facts of the present case. The passages in the judgment of Lord Campbell C.J. in that case with regard to warranty must be read in connection with the averments in those counts that the defendants knew the character of the goods. The implied undertaking of the shippers, as stated by him (1), is that they will not ship dangerous goods which the shipowners cannot reasonably be expected to know to be dangerous "without expressly giving notice that they are of a dangerous nature." The shippers cannot be subject to a duty to give notice of that which they, themselves, do not know, and cannot reasonably be expected to know. It is submitted that the case at the most only decides that there is an obligation on the part of the shippers to give notice to the shipowners of the dangerous character of the goods, where they know or ought to know it themselves. In *Acatos* v. *Burns* (2) Brett L.J. said that "neither *Brass* v. *Maitland* (3) nor any other case shews that there is a warranty by the shipper that the goods shipped have no concealed defects at the time of shipment." In that case the question arose with regard to a parcel of maize which was dangerous from having become heated; and it was held that, as the character of the maize was as well known to the shipowner as to the shipper, there was no liability on the part of the latter. That case clearly shews that there is no such implied warranty by the shipper as is suggested in the present case. There is really no evidence here that the defendants knew, or ought to have known, of the dangerous character of ferro-silicon.

Lowenthal, for the plaintiff. The result of the authorities is that there is an implied undertaking on the part of the shipper of goods that they are not of a dangerous character, or, if of a dangerous character, that they are so shipped that no mischief can be caused, subject to the limitation that, if there is express or implied notice to the shipowner of the danger, and the latter

(1) 6 E. & B. at p. 481. (2) 3 Ex. D. 282, at p. 292
(3) 6 E. & B. 470.

consents to receive the goods, the implication of such an undertaking is rebutted. At any rate there is such an implication where the shipper of the goods knew, or could have ascertained by inquiry, the dangerous character of the goods. If the shipowner knows what the goods shipped are, and the dangerous character of goods of that kind is common knowledge among those dealing with such goods in the way of business, then, no doubt, there may be no warranty or undertaking as to their character. In *Acatos* v. *Burns* (1) the ground of the decision was that, the goods in question being maize, the properties of which were well known, the parties were on an equality as regards knowledge, and therefore there was no room for the implication of a warranty. *Brass* v. *Maitland* (2) has always been treated in the books of authority on this subject as deciding that there is such a warranty as is contended for by the plaintiff. The owner of the barge in this case was a common carrier, and the ferro-silicon was delivered to him as such for carriage as general cargo, without notice of its nature. In such a case, inasmuch as the carrier is under a legal obligation to carry goods delivered to him for carriage, there is, if no notice is given to him of the dangerous nature of the goods, an implied warranty that they are not of a dangerous character, whether the shippers knew them to be dangerous or not, unless it appears that the carrier knew, or ought to have known, of their character. [He also cited on this point *Peek* v. *North Staffordshire Ry. Co.* (3); *Readhead* v. *Midland Ry. Co.* (4); *Dunn* v. *Bucknall Brothers* (5); *Wyld* v. *Pickford* (6); *Blower* v. *Great Western Ry. Co.* (7); *Hutchinson* v. *Guion* (8); *Hearne* v. *Garton* (9); *Farrant* v. *Barnes.* (10)]

Secondly, assuming that there is no absolute warranty, and that the liability of the shipper of goods is only to use due care not to ship dangerous goods without informing the shipowner of

(1) 3 Ex. D. 282.
(2) 6 E. & B. 470.
(3) (1863) 10 H. L. C. 473.
(4) (1867) L. R. 2 Q. B. 412; (1869) L. R. 4 Q. B. 379.
(5) [1902] 2 K. B. 614.
(6) (1841) 8 M. & W. 443.
(7) (1872) L. R. 7 C. P. 655.
(8) (1858) 5 C. B. (N.S.) 149.
(9) (1859) 2 E. & E. 66.
(10) (1862) 11 C. B. (N.S.) 553. [See also *Lyell* v. *Ganga Dai*, (1875) Ind. Law Rep. 1 All. 60.—F. P.]

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their character, there was evidence in this case of negligence on the part of the defendants. Having regard to the serious consequences that may follow from the shipment of dangerous substances on board a ship, in respect of the safety of other cargo, and even of the lives of those on board, it is the duty of the shipper of goods to use all reasonable care to inform himself of the character of the goods which he is shipping, and to give notice to the shipowner of the same if dangerous. It is negligence to ship a chemical like ferro-silicon in ignorance of its properties without any inquiry. There is evidence in this case to shew that the defendants by proper inquiry might have ascertained that ferro-silicon was dangerous unless due precautions were taken.

W. H. Owen, for the defendants, in reply. *Acatos* v. *Burns* (1) is really conclusive to shew that there is no such warranty as has been suggested, and there can be no duty on the part of the shipper to disclose to the shipowner what he does not know, and cannot be expected to know, himself. Assuming that there is a duty on the part of the shipper of goods to use reasonable care in the matter, what is reasonable must depend on circumstances. It cannot be that, in the case of a forwarding agent, or transhipper of goods, who has to forward goods directly, there is a duty to examine and test the goods, or institute a searching inquiry into their properties, before forwarding or transhipping them. As a matter of business it would be impossible to do so. Unless there is something to put him on inquiry, knowledge of the dangerous character of goods is not to be imputed to him, where he does not know of it, and the goods are not generally known to be dangerous. The evidence shews that at the time of the shipment in question it was known in certain scientific and official quarters that mischief had arisen in some cases from ferro-silicon, but there was no general knowledge on the subject. Apart from the existence of a warranty, the general position of the common law in regard to damage occasioned by a latent defect, which could not by the exercise of reasonable care be discovered, is that such damage must be regarded as an accident. Both parties are on an equality as far as knowledge

(1) 3 Ex. D. 282.

is concerned, and one is not more responsible for what must be regarded as an accident than the other.

Cur. adv. vult.

May 10. VAUGHAN WILLIAMS L.J. read the following judgment:—In this case Walton J., having found, first, that the defendants did not know that the ferro-silicon which the defendants delivered to Bamfield, an inland carrier by water, to be carried from Goole to Sheffield in his barge, was dangerous to carry, and, secondly, that Bamfield, the water carrier, did not know that the goods delivered to him were dangerous, thus summarizes the material facts and his conclusion in law: "Although I have not found that the defendants knew that the goods were dangerous, and although I have not found that they ought to have known that the goods were dangerous, and that knowledge ought to have been imputed to them, I find that the goods were dangerous, that no notice was given, and that damage ensued—the damage in respect of which compensation is claimed in this action. Upon the authority of *Brass* v. *Maitland* (1) I may say that the plaintiff's case is made out."

Brass v. *Maitland* (1) is summarized by Blackburn J. in *Readhead* v. *Midland Ry. Co.* (2), and his view is that the judgment of the majority of the Court, Lord Campbell C.J. and Wightman J., establishes the principle that, where one party to a contract engages to select and supply an article for a particular purpose, and the other party has nothing to do with the selection, but relies entirely on the party who supplies, it is to be taken as part of the contract implied by law that the supplier warrants the reasonable sufficiency of the article for that purpose; and I think he means that the majority of the Court were of opinion that a consignor of goods to be carried warrants that the goods are fit to be carried, and not dangerous. In *Brass* v. *Maitland* (1) the decision dealt with the duty of consignors of goods to be carried by sea in a general ship, and therefore was in no way based upon the obligation of carriers by the custom of the realm. Blackburn J., in *Readhead* v. *Midland Ry. Co.* (3), in noting the

(1) 6 E. & B. 470. (2) L. R. 2 Q. B. 412.
(3) L. R. 2 Q. B. 412, at p. 437.

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fact that Crompton J. delivered a dissentient judgment, says that "The effect of the judgment of Crompton J. is such as to shew that he did not think the principle general, and was not inclined to carry it further than the decisions had already gone." Blackburn J. in his judgment in that case preferred the judgment of the majority of the Court in *Brass* v. *Maitland* (1), and differed from the majority of the Court, Lush J. and Mellor J., in *Readhead* v. *Midland Ry. Co.* (2); and the Exchequer Chamber (3) affirmed the judgment of the majority, that is of Lush J. and Mellor J., and differed from Blackburn J. Again, the case of *Brass* v. *Maitland* (1) was considered in *Acatos* v. *Burns*. (4) In the Exchequer Chamber Bramwell L.J., speaking of the counter-claim of the defendants, which was a counter-claim for damages for the wrongful shipping by the plaintiff of maize which he knew to be in a dangerous condition, says: "As to the counter-claim, the statement is such that if there were a warranty in point of law that the goods were in a state which made them safe for shipment, that is, that they could be safely carried, the facts are sufficiently stated to shew a breach of the warranty; but I am of opinion that there was no such warranty. We might admit *Brass* v. *Maitland* (1) to be good law, and yet say that it does not govern this case, for the quality of the article tendered for shipment was as well known to the shipowner as to the shipper. I am therefore of opinion that there was no such warranty, and on that ground the counter-claim fails." (5) Brett L.J. in the same case says: "As to the warranty, neither *Brass* v. *Maitland* (1) nor any other case shews that there is a warranty by the shipper that the goods shipped have no concealed defects at the time of the shipment." (5)

Acatos v. *Burns* (6) in my opinion goes to negative the general principle referred to by Blackburn J. as being established by the judgments delivered by Lord Campbell C.J. and Wightman J. in *Brass* v. *Maitland*. (1) *Brass* v. *Maitland* (1) is discussed again in *Farrant* v. *Barnes*. (7) Erle C.J. in his

(1) 6 E. & B. 470.
(2) L. R. 2 Q. B. 412.
(3) L. R. 4 Q. B. 379.
(4) 3 Ex. D. 282; 47 L. J. (Ex.) 566.
(5) These citations are from the report in the *Law Journal*.
(6) 3 Ex. D. 282.
(7) 11 C. B. (N.S.) 553.

judgment in that case (1) cites first the view of Lord Campbell expressed in his judgment in *Brass* v. *Maitland* (2) as follows: "Where the owners of a general ship undertake that they will receive goods and safely carry them, and deliver them at the destined port, I am of opinion that the shippers undertake that they will not deliver, to be carried in the voyage, packages of goods of a dangerous nature, which those employed on behalf of the shipowner may not on inspection be reasonably expected to know to be of a dangerous nature, without expressly giving notice that they are of a dangerous nature," and then sets out the view of Crompton J. expressed in these words: "Probably an engagement or duty may be implied that the shipper will use and take due and proper care and diligence not to deliver goods apparently safe but really dangerous, without giving notice thereof; and any want of care in the course of the shipment in not communicating what he ought to communicate might be negligence for which he would be liable: but, where no negligence is alleged or where the plea negatives any alleged negligence, I doubt extremely whether any right of action can exist." After these quotations Erle C.J. thus states his own conclusion in *Farrant* v. *Barnes* (3): "Here, it is expressly found by the jury that the defendant took no precaution to inform the plaintiff of the dangerous nature of the article in question when he entrusted it to him to carry. It seems to me that the principle on which the decision of *Brass* v. *Maitland* (4) is founded, taking it in the narrowest and most limited way, authorizes us to say that the defendant in this case is responsible for the injury which the plaintiff has sustained."

It will be observed that Lord Campbell seems, by the language in his judgment, to recognize that knowledge, or the opportunity of knowledge, is essential to raise the duty of the consignor, whether such duty takes the form of implied warranty, or a duty to take reasonable care not to ship goods apparently safe but really dangerous; for Lord Campbell speaks of the undertaking by the shippers that they will not deliver to be carried goods of a dangerous nature, which those employed on behalf of the

(1) 11 C. B. (N.S.) 562.
(2) 6 E. & B. 470, at p. 481.
(3) 11 C. B. (N.S.) 563.
(4) 6 E. & B. 470.

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shipowner may not on inspection be reasonably expected to know to be of a dangerous nature.

The outcome of these cases seems to me to be that generally no warranty that the goods are fit to be carried ought to be implied unless the consignor knew or ought to have known of the dangerous character of the goods he was tendering for carriage; but it is said that such a warranty may arise in the case of a common carrier on inland waters who is bound as such to receive the goods tendered for carriage. I think not. So to hold would be a plain extension of the principle which Crompton J. in *Brass* v. *Maitland*(1) said he did not think general, and which he thought ought not to be carried further than the decisions had already gone. I think that no warranty that the goods were fit to be carried, or were not dangerous to carry, would arise unless the barge-owner, be he common carrier or not, was placed in a position where he had no opportunity of getting information as to the nature of the goods consigned, and had to rely on the obligation on the consignor or sender of the goods not to tender for carriage dangerous goods not fit to be carried because they were dangerous to his knowledge, or goods which he might have known to be dangerous, if he had availed himself of opportunities of inspection or examination, which the carrier, Bamfield, had not got. It will be observed that in this case the defendants were merely forwarding carriers, having received the ferro-silicon from the railway company, who in turn received it from a ship, the first consignors being the German merchants.

I do not think that I can say that this is the case here when the judge has found that the defendants did not know that the goods were dangerous, and has not found that the defendants ought to have known.

My conclusion is that, if the knowledge and opportunities of knowledge are equal, and there is nothing in the contract or the surrounding facts to shew that one party relies entirely on the other party, be he consignor of goods to be sold or vendor of food to be eaten, no warranty will arise as to the fitness of the goods to be carried, or the fitness of the article sold as food. If the cause of action in this case is treated as an action for a tort,

(1) 6 E. & B. 470.

as it was necessarily treated in *Farrant* v. *Barnes* (1), the passage quoted by Willes J. from the judgment of Lord Ellenborough in *Williams* v. *East India Company* (2) shews plainly that the legal duty for the breach of which this action is brought only arises when the defendants are "conusant of the dangerous quality of the article." Again, Erle C.J. says in his judgment in *Farrant* v. *Barnes* (3): "The defendant, knowing the dangerous character of the article, and omitting to give notice of it to the plaintiff, so that he might exercise his discretion as to whether he would take it or not, was guilty of a clear breach of duty." Then the Chief Justice, after saying that the case is covered by *Langridge* v. *Levy* (4), goes on to say, "The case, however, upon which I rely is *Brass* v. *Maitland*." (5) That case, however, was based upon a breach of an implied warranty, but in my judgment the knowledge of the defendant is material alike in an action based on tort and in an action based on contract; but I think that in an action based on contract actual knowledge by the defendant is not essential. It is sufficient in such a case if the circumstances were such that the defendant ought to have known; but Walton J. has not found as a fact that the defendants in this case "ought to have known"; and in my judgment this is a fact the onus of proving which was on the plaintiff.

The only ground upon which I think the plaintiff could succeed would be if one draws the conclusion that the company, whether or not they knew ferro-silicon to be occasionally dangerous of carriage, ought not to have described the ferro-silicon in casks as general cargo, but to have told Bamfield that which they knew and Bamfield did not know, namely, that the article in the casks was ferro-silicon. This is a long way off the judgment of the majority of the Court in *Brass* v. *Maitland* (5), on which case Walton J. decided the present case. But I have come to the conclusion that we ought, following the judgment of Crompton J. in that case, to dismiss the appeal on the ground that the defendants owed a duty to Bamfield to communicate such information as they had as to the nature of the goods to be

(1) 11 C. B. (N.S.) 553.
(2) (1802) 3 East, 192.
(3) 11 C. B. (N.S.) 561.
(4) (1837) 2 M. & W. 519; (1838) 4 M. & W. 337.
(5) 6 E. & B. 470.

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sent in the barge; and that through their servants they were guilty of negligence and want of care in not communicating to the carrier the name, which they knew, of this somewhat unusual cargo. The measure of damages, in my opinion, will be the same whether the cause of action is breach of implied warranty or negligence.

This appeal will be dismissed with costs.

FLETCHER MOULTON L.J. read the following judgment:—The facts of the present case are simple, but they raise a question of great general importance as to the rights of common carriers. The plaintiff is the widow of William Moxon Bamfield, who was the owner of a canal boat plying between Goole and Sheffield, and in October, 1908, the defendants shipped on board his boat at Goole for carriage to Sheffield goods which are described as a general cargo in the only documents which according to the evidence were given to him. These goods consisted of twenty-seven closed casks containing ferro-silicon. The defendants sought to prove that he was informed of the contents of these casks, but the judge has found that they failed in so doing, and, so far as I am in a position to judge of the conclusion to which he came in this respect, I am of opinion that he was right in so finding. Whether by reason of imperfect packing or otherwise, the ferro-silicon underwent chemical change during the transit, and the judge finds that the gases given off thereby were the cause of the death of William Moxon Bamfield and of the illness of the plaintiff. She sues the defendants for damages in respect of the death of her husband and her own sufferings, and the judge has found a verdict in her favour for 325*l*. It is not contested in this appeal that the plaintiff's illness and the death of her husband were due to the gases given off by the ferro-silicon, nor is the amount of the damages contested if the facts give to the plaintiff any cause of action. The only point raised by the appeal is that the defendants are in no way responsible for the consequences of their having shipped the goods.

The evidence with regard to ferro-silicon clearly establishes that, while some specimens are stable, others are liable to give off gases if exposed to moisture. These gases are amongst the

most poisonous known to chemists, one of them being so violent in its action that a minute quantity if inhaled is sufficient to cause instant death. The use of ferro-silicon in iron manufacture is of comparatively recent growth, but cases of death from gases given off by ferro-silicon had been known for some years prior to the occurrence of the events which led to the present action, and in 1907 the Board of Trade published a notice to shipowners warning them against the dangers connected with its carriage. The learned judge has, however, found that the defendants did not know that ferro-silicon was dangerous when they shipped it, although he finds, as he was bound to find, that it was in fact a dangerous substance. It is admitted that the plaintiff's husband received and carried these goods as a common carrier.

The facts of the case therefore stand thus. A common carrier receives as such a quantity of general cargo the nature of which he does not know and is not informed of. The goods so received by him are in fact dangerous goods, and as such unfit for carriage as general cargo. If damage results from the dangerous character of the goods, are the shippers liable?

The cardinal fact in this case is that common carriers have a duty to carry the goods tendered to them for a fair price unless there is a reasonable excuse, and, these goods being tendered to him as general cargo by the defendants, the plaintiff's husband was in law bound to carry them, unless there was a reasonable ground for his refusing to do so. There is no suggestion of his knowledge of any circumstances that would justify his refusing to carry the casks, and therefore we must hold that, as a common carrier, he was bound to carry these casks on their being so tendered to him. That being so, I should have felt bound to hold, even if the matter were res integra, that there was a correlative duty on the part of the tenderer that the goods should be fit and proper for carriage. It seems to me to be consonant with and required by the fundamental principles of English law that one who thus requires an individual to perform a legal duty impliedly warrants that he has a title to make the request. In the case of a ministerial duty this principle has been recognized by the House of Lords in the case of *Sheffield Corporation* v. *Barclay* (1),

(1) [1905] A. C. 392

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where a banker in good faith sent to a corporation a transfer of corporation stock which purported to be executed by the registered holders of the stock, with a request to the corporation to register the stock in the name of the banker. One of the signatures was in fact forged, and the House of Lords held that the banker was bound to indemnify the corporation upon an implied contract that the transfer was genuine. Lord Davey lays down the law thus (1): "I am further of opinion that where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction, or demand of another (it does not seem to me to matter which word you use), and without any default on his own part acts in a manner which is apparently legal but is, in fact, illegal and a breach of the duty, and thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty." By analogy it is in my opinion good law that, where a man calls upon a common carrier to carry general cargo, thus relying simply upon the common law duty of the carrier so to do, and without informing the carrier of the nature of those goods so as to enable him to judge of their fitness, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against damages arising from the fact that the goods are not such that he had the right thus to call upon the common carrier to carry.

But the matter is not res integra, although it may be that the exact case is not fully covered by authority. In the case of *Brass* v. *Maitland* (2) the plaintiffs were owners of a general ship and the defendants delivered to them casks of bleaching powder of a corrosive character to be carried from London to Calcutta. The declaration contained two counts, the first based on improper packing, whereby the corrosive contents escaped and destroyed the general cargo, and the second on the defendants having shipped a dangerous article, knowing it to be such, without notice to the plaintiffs of its dangerous character. Both counts alleged ignorance on the part of the plaintiffs of the dangerous

(1) [1905] A. C. 399. (2) 6 E. & B. 470.

character of the goods. To the first count it was pleaded that the defendants purchased the goods from a third party ready packed, and were not guilty of negligence. Another plea to the first count alleged that the persons employed on the ship knew and had the means of judging of the sufficiency of the casks. To the second count there was a plea that the master of the ship knew, or had the means of knowing, the dangerous character of the goods. On demurrer both counts were held to be good, and the first of the three pleas above mentioned was held to be bad as an answer to the first count. The other two pleas were held to be good as amounting to an allegation of facts equivalent to notice. In delivering the judgment of the majority of the Court Lord Campbell C.J. says (1): "Where the owners of a general ship undertake that they will receive goods and safely carry them and deliver them at the destined port, I am of opinion that the shippers undertake that they will not deliver, to be carried in the voyage, packages of goods of a dangerous nature which those employed on behalf of the shipowner may not on inspection be reasonably expected to know to be of a dangerous nature, without expressly giving notice that they are of a dangerous nature." Reference has been made to this judgment (which was the judgment of the majority of the Court) as establishing that there is an absolute warranty that goods delivered to a common carrier for carriage are safe and fit to be carried on the voyage, but a perusal of the judgment shews that no such warranty is regarded as existing where adequate notice has been given to the carrier of the nature of the goods tendered, or where the carrier had the means of knowing and reasonably ought to have known their nature. In such a case Lord Campbell C.J. says (2): "There was no occasion for the defendants to give any express notice and they cannot be charged with any breach of duty in putting the packages on board, however dangerous they might be." The true inference in such a case is that the carrier consents to carry them with knowledge of their nature, and therefore he takes upon himself both the obligation to take adequate precaution in the carriage and the consequences of his thus carrying them.

(1) 6 E. & B. 481. (2) 6 E. & B. 486.

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In *Brass* v. *Maitland* (1) Crompton J. delivered a dissenting judgment, which rather expresses his doubt as to the principles laid down in the judgment of the majority of the Court than supplies any definite conclusions on the part of that eminent judge as to what are the rights and obligations of a common carrier and a shipper respectively. He had no doubt that the shipper of goods known by him to be dangerous was bound to give notice of the fact to the carrier, but he felt a difficulty in holding that the duty went further than to give notice if the shipper was himself aware of the fact. On this point the judgment of the majority of the Court is in my opinion correct. Inasmuch as a common carrier is liable to a shipper for damage done to the goods from other goods shipped with them, it is evident that no carrier could safely carry on his business without knowledge of the nature of the goods given him to carry unless the shipper of dangerous goods without notice is liable to indemnify him against the consequences of their being dangerous. The only alternative would be that the carrier has a duty to ascertain the nature of the goods, and a right to compel disclosure of their nature from the shipper, and it is therefore his fault that he does not know the nature of the goods. But, as Lord Campbell C.J. says (2), in cases where the carrier has neither knowledge nor the means of knowledge of the dangerous nature of the goods, "if under these circumstances there were not a duty incumbent on the shipper to give notice of the dangerous nature of the goods to be shipped, commerce could not be carried on. It would be strange to suppose that the master or mate, having no reason to suspect that goods offered to him for a general ship may not safely be stowed away in the hold, must ask every shipper the contents of every package. If he has not to do so, and there is no duty on the part of the shipper of a dangerous package to give notice of its contents or quality, the consequence is that, without any remedy against the shipper, although no blame is imputable to the shipowners or those employed by them, this package may cause the destruction of the ship and all her cargo and the lives of all who sailed in her." This reasoning appears to me to shew that the duty

(1) 6 E. & B. 470. (2) 6 E. & B. 482.

on the part of the shipper is looked upon as a necessary protection to the carrier in his business. It follows that it does not depend upon any scienter on the part of the shipper. If he calls upon the carrier to perform the common law duty of carrying the goods, he must take care either that he gives notice of their nature or that they are fit to be carried as ordinary goods.

Much reliance was placed by the appellants on the case of *Acatos* v. *Burns* (1) as limiting or throwing doubt upon the decision of the Court of Queen's Bench in *Brass* v. *Maitland*. (2) To my mind there is no conflict between the two decisions. In *Acatos* v. *Burns* (1) there was the clearest notice to the carrier of the nature of the goods which he was requested to carry. They consisted of a parcel of maize, and it was proved that the maize was taken alongside the steamer in lighters and shipped in bulk: it was winnowed on board by the agents of the shipper, and, after each fifty kilos of the maize was shipped, the second officer of the ship examined it. On the voyage the maize sprouted, and the action was for damages for landing the maize at an intermediate port and selling it without authority. The jury found that the maize was not in a fit condition to be shipped. In my opinion the true inference to be drawn in this case on the principles laid down in *Brass* v. *Maitland* (2) was that the carrier had full knowledge of the nature of the goods that he was required to carry. One of the incidents in carrying maize in bulk is that under certain circumstances it may sprout. But that was a risk which the carrier took upon himself in consenting to carry goods known to be liable to such a contingency, and the careful examination made on behalf of the ship at the port of loading shews that the carrier was well aware of the risks he was taking.

There is further authority in favour of the plaintiff's case. *Farrant* v. *Barnes* (3) was a case in which the defendant employed the plaintiff to carry an article of dangerous character, namely, a carboy of nitric acid, without notice to him of the nature of the article. The carboy exploded and injured the plaintiff, and

(1) 3 Ex. D. 282. (2) 6 E. & B. 470.
(3) 11 C. B. (N.S.) 553.

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he was held entitled to recover damages for the injury on the ground that the defendant was liable for damages resulting from his not having given notice to the plaintiff of the dangerous character of the goods. In his judgment in this case Willes J. says (1): "I apprehend that, as a matter of legal duty, a person who gives another dangerous goods to carry, goods which require more care and caution than ordinary merchandise, and which are likely in the absence of such caution to injure persons handling them, is bound to give notice of their dangerous character to the party employed to carry them and is liable for the consequences which are likely to ensue from the omission to give such notice . . . . The case of a shipment of dangerous goods may be an extreme case; but it serves to illustrate the general principle that, wherever a person employs another to carry an article which from its dangerous character requires more than ordinary care, he must give him reasonable notice of the nature of the article, and that, if he fails to do so, he is responsible for the probable consequences of his neglect." Similarly Keating J. in his judgment says: "It is clear that persons sending dangerous articles by a carrier are bound to give notice of their character." It is true that the other member of the Court refers in his judgment to the fact that the defendant was aware of the dangerous character of the article, but it is to be noted that he expressly relies on the decision in *Brass* v. *Maitland* (2), which did not depend on any scienter on the part of the shipper.

For the above reasons, therefore, I am of opinion that the judgment of the learned judge in favour of the plaintiff was right, and that this appeal should be dismissed with costs.

FARWELL L.J. read the following judgment:—This appeal raises a question of some importance, on which there appears to be no direct authority, and which may be stated thus. Does a consignor who tenders goods to a common carrier for carriage impliedly warrant that they are fit for carriage in the sense that they are not dangerous to be carried as delivered and packed, (*a*) if the consignor is ignorant of their dangerous character, and

(1) 11 C. B. (N.S.) 563, 564, 565. (2) 6 E. & B. 470.

(*b*) if he knows their nature, but is ignorant of its danger, the carrier in both cases being ignorant of the nature of the goods, and therefore necessarily ignorant of the danger? It is pleaded by both parties that the deceased Bamfield was a common carrier, and he is a carrier to whom the provisions of the Railway and Canal Acts do not apply. Now I think that it is clear on the authorities that, if the consignor knows of the dangerous nature of the goods, he is bound to inform the carrier thereof. Thus in *Brass* v. *Maitland* (1) Lord Campbell says: "Where the owners of a general ship undertake that they will receive goods and safely carry them and deliver them at the destined port, I am of opinion that the shippers undertake that they will not deliver, to be carried in the voyage, packages of goods of a dangerous nature, which those employed on behalf of the shipowner may not on inspection be reasonably expected to know to be of a dangerous nature, without expressly giving notice that they are of a dangerous nature." But a duty to disclose is one thing, and a warranty of safety is another; for there can be no duty to disclose a fact that the consignor neither knows nor ought to have known, and an action founded on the failure to perform such a duty must allege and prove scienter, and differs in that respect from an action on warranty like the present. But, although it is true that in all the cases cited to us the consignors either knew or ought to have known of the danger, the principle on which the judgments rest is the common law obligation of the carrier to carry according to his profession, and the correlative obligation of the consignor to tender for carriage such goods only as can be safely carried. In my opinion every consignor who tenders goods to a common carrier, to be carried by him in performance of his common law obligation to carry, thereby impliedly warrants to the carrier that the goods so tendered are fit to be carried in the ordinary way and are not dangerous. This principle is not confined to carriers, but extends mutatis mutandis to all cases where any one is entitled to call on another to perform a public duty at his instance. Thus the sheriff who, acting innocently in compliance with the directions of a judgment creditor, commits a trespass, is entitled to be indemnified

(1) 6 E. & B. 481.

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by the creditor who directed him: *Humphrys* v. *Pratt* (1); *Collins* v. *Evans* (2), explained by Lord Davey in *Sheffield Corporation* v. *Barclay*. (3) The transferee or broker who requests a corporation or the Bank of England to register the transfer impliedly warrants that the transfer is genuine: *Sheffield Corporation* v. *Barclay* (4); *Bank of England* v. *Cutler*. (5) Lord Davey in the former case (6) states the principle thus: "I am further of opinion that where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction, or demand of another (it does not seem to me to matter which word you use), and without any default on his own part acts in a manner which is apparently legal but is, in fact, illegal and a breach of the duty, and thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty. And it makes no difference that the person making the request is not aware of the invalidity in his title to make the request, or could not with reasonable diligence have discovered it." It will be observed that he confines his proposition to a duty of a ministerial character, but I think that this is only because that was the actual case before the House: he could not have intended "ministerial" to exclude cases in which the person performing the obligation had some pecuniary interest, for the corporation in that case were dealing with the register of their own debenture stock, and received a small sum for registering; and Lord Halsbury suggests no such limitation; and, when the reason for the principle is considered, it is plain to my mind that it extends beyond cases of mere ministerial duty where no personal interest is involved. If two persons are contracting on equal terms, either party being free to accept or reject the offer of the other, there is no reason as a general rule for presuming anything more than the parties have expressed in their contract. But, if one party is bound by law

(1) (1831) 5 Bli. (N.S.) 154.
(2) (1844) 5 Q. B. 804, 820.
(3) [1905] A. C. 392, at pp. 399-401.
(4) [1905] A. C. 392.
(5) [1908] 2 K. B. 208.
(6) [1905] A. C. 399.

to act on the request of the other, and is not even entitled to inquire and compel an answer as to the contents of packages tendered, it is in my opinion only reasonable to imply a warranty by the person so enforcing his common law right that the packages tendered are not dangerous; the warranty arises out of the request to perform the common law obligation which arises only upon such request: see Lord Halsbury's speech in *Sheffield Corporation* v. *Barclay*. (1) It may also be put thus: a common carrier is bound to carry according to his profession, but he does not profess to carry goods dangerous to life or limb: he is bound, to use Lord Holt's phrase in *Lane* v. *Cotton* (2), to carry "packets proper to be sent by a carrier": the consignor who tenders for carriage goods whose nature is not disclosed, to be carried in accordance with the carrier's common law duty, impliedly warrants that they are goods which the carrier is bound to carry, because he has tendered them to be carried in accordance with the common law duty. It is true that we are dealing with a common carrier who carries for reward, and not with a person performing a mere ministerial office; but a common carrier stands in a peculiar position at common law. Parke B. in *Johnson* v. *Midland Ry. Co.* (3) speaks of him as a person who has undertaken a public trust and says: "Wherever any subject takes upon himself a public trust for the benefit of the rest of his fellow subjects, he is eo ipso bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him." He is bound to carry according to his profession at common law, and is liable to an action for refusing, and he is further bound as bailee of the goods entrusted to him to answer for such goods at all events—that is, he is an insurer of them except only against loss occasioned by the act of God or the King's enemies. It follows from the line of reasoning adopted by Lord Blackburn in *Readhead* v. *Midland Ry. Co.* (4) (which is not, in my opinion, affected by the judgment in the Exchequer Chamber in that case) that in all such cases the undertaking of the consignor with the carrier is co-extensive with the undertaking of the

(1) [1905] A. C. 395.
(2) (1700) 12 Mod. 473, at p. 484.
(3) (1849) 4 Ex. 367, at p. 372.
(4) L. R. 2 Q. B. 412, at pp. 433-437.

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carrier to the consignor. Again, apart from the Carriers Act, which extends only to the extent of liability to the particular consignor, and does not affect the present case, a common carrier at law cannot compel disclosure of the contents of packages before he accepts them: *Crouch* v. *London and North Western Ry. Co.* (1) Indeed it is obvious that business could not be carried on if every common carrier had a right to have the packages—often nailed up packing cases—unpacked before him. He is compelled by law to accept and take on trust and carry the packages tendered to him: if they are explosives and blow all his cargo to pieces, he is liable to all the other owners whose goods he was carrying with them: if they are ill packed, e.g., petroleum in a cask that develops a leak and soaks the other owners' goods, he is also liable; and, if the goods are dangerous, he risks his own life and limb and the lives and limbs of his employees: it is only reasonable that the consignors of such dangerous or ill-packed goods should indemnify him from the consequences of the performance of the statutory obligation which such consignors imposed upon him. The importance of this is emphasized by the case of *Walker* v. *Jackson*. (2) There the defendants were not common carriers of goods at all, but owners of a ferry, and they contracted to carry over and land a carriage, which contained certain jewellery, and the defendants were held liable for the loss of the jewellery, although the plaintiffs had not communicated to the defendants the presence thereof in the carriage. Parke B. there says (3): "If anything is delivered to a person to be carried, it is the duty of the person receiving it to ask such questions about it as may be necessary: if he ask no questions, and there be no fraud to give the case a false complexion, on the delivery of the parcel, he is bound to carry the parcel as it is. It is the duty of the person who receives it to ask questions: if they are answered improperly, so as to deceive him, then there is no contract between the parties: it is a fraud which vitiates the contract altogether." That is to say, both parties in making a special contract are free to make their own bargain, and each has himself only to thank if he

(1) (1854) 14 C. B. 255. (2) (1842) 10 M. & W. 161.
(3) 10 M. & W. 168.

omits to take proper precautions by insuring. It is because the common carrier cannot insist on information of this character that the consignor is deemed to warrant the innocuous character of the goods tendered. The implied warranty is, however, displaced by evidence that the carrier, on accepting the goods, knew of their unfitness or dangerous character, whether such knowledge arises from express information or from the general knowledge of mankind of the natural incidents of the goods tendered for carriage: in such cases the carrier carries under a special contract and not under his common law liability, and can make what special terms he pleases, and the ordinary limitation on a common carrier of reasonableness of charges does not apply, because he can refuse to carry at all. In *Acatos* v. *Burns* (1) both parties knew that the cargo was maize, and that maize was liable to heat. Lord Bramwell says (2): "The quality of the maize tendered for shipment was as much known to the one side as the other"; and Lord Esher says that (3) "neither *Brass* v. *Maitland* (4) nor any other case shews that there is a warranty by the shipper that the goods shipped have no concealed defects at the time of shipment"; which, read by the light of the facts in that case, means, I think, that no case shews that, where both parties know that the cargo is such an article as maize, the shipper warrants that it is not subject to the not unusual peril of heating. In the present case, the consignors knew that the cargo was ferro-silicon and the carrier did not; and that authority has no application. To make it applicable, the maize should have been shipped in sacks or cases concealing its nature.

This action is brought under Lord Campbell's Act, and also by the carrier's widow in her own right for injuries received by her when she was on board the barge acting as her late husband's assistant. But the extent of the liability on the warranty that the goods tendered are not dangerous is not limited to the goods of others carried or the conveyance on which they are carried, but is an absolute warranty that the goods are not dangerous to be carried by the carrier or his servants or employees. Such

(1) 3 Ex. D. 282.
(2) 3 Ex. D. 288.
(3) 3 Ex. D. 292.
(4) 6 E. & B. 470.

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warranty is given to the latter as well as to the carrier himself on the same ground that the duty to disclose was held to exist towards the carrier's servants as well as the carrier himself in *Farrant* v. *Barnes*. (1)

I am therefore of opinion that this appeal fails and should be dismissed with costs.

Solicitors for plaintiff: *Fielder, Fielder & Jones, for W. F. W. Rhodes, Brighouse.*

Solicitors for defendants: *Hill & Aspinall, for A. M. Jackson & Co., Hull.*

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April 11.

MILTON *v.* STUDD.

Betting Circular—Infant—Circular sent to Undergraduate—Presumption of Knowledge of Infancy—"Any person at any university"—Betting and Loans (Infants) Act, 1892 (55 & 56 *Vict. c.* 4), *s.* 3.

A circular sent to a person at an address in a university town is not sent to a person "at a university" within the meaning of s. 3 of the Betting and Loans (Infants) Act, 1892, unless the sender knows that the address is that of a house at which undergraduates are permitted by the university authorities to reside.

So *held* by Channell and Bray JJ., Lord Alverstone C.J. dissenting.

CASE stated by justices of Croydon.

The appellant was charged with having sent to one Eric Fairfax Studd, whom he knew to be an infant, a circular inviting him to apply to the appellant for information relating to a certain horse race contrary to the provisions of the Betting and Loans (Infants) Act, 1892.

At the hearing the following facts were proved:—

(*a*) The respondent lives at Oxton, near Exeter, and his son the said Eric Fairfax Studd was in September, 1909, and at the date when the circular hereinafter mentioned was sent an infant of about nineteen years of age and an undergraduate of Cambridge University.

(*b*) The appellant carries on business at Croydon and holds

(1) 11 C. B. (N.S.) 553.

himself out as a person who for profit gives information upon horse races and the horses likely to win horse races.

(*c*) In September, 1909, the appellant purchased about five thousand letters containing the names and addresses of the writers thereof from one Newman, of Newmarket, for the purpose of sending to the writers of the said letters his business circulars.

(*d*) The appellant stated that he gave instructions to his clerks not to send any such circulars to any one at a university college, school, or other place of education in view of the provisions of the Betting and Loans (Infants) Act, 1892, of which the appellant stated he was then fully aware.

(*e*) Amongst the said letters referred to in paragraph (*c*) was one on unstamped fancy notepaper which was as follows: "6, Benet Street, Cambridge, May 3. Dear Sir,—I enclose £1 for ten winners starting from to-morrow Wednesday. Please wire as early as possible. Yours truly, E. F. Studd." The whole of the said letter was in manuscript.

(*f*) The appellant had no knowledge regarding the said Eric Fairfax Studd or whether he was or was not an infant or an undergraduate or whether the said address was or was not a licensed lodging-house.

(*g*) The appellant did not see and was not aware of the existence of the letter set out in paragraph (*e*) until after he was served with the summons herein.

(*h*) A circular relating to and inviting the said Eric Fairfax Studd to apply to the appellant for information about a horse race known as the Cesarewitch, a race upon which betting is usually carried on, was sent by the appellant's instructions from his business premises for the purpose of earning profit to the said Eric Fairfax Studd at 6, Benet Street, Cambridge, on September 18, 1909, in an envelope addressed "E. F. Studd, Esq., 6, Benet Street, Cambridge."

(*i*) The circular so addressed as aforesaid was, in the absence of E. F. Studd from Cambridge, forwarded to Oxton, and was there opened by the respondent, who in due course laid the information.

(*j*) 6, Benet Street, Cambridge, is a lodging-house licensed by

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the authorities of Cambridge University for the residence of undergraduates residing in the university, and is situate within the precincts of the university.

Upon the above facts it was contended on the part of the appellant that there was no evidence that he knew Eric Fairfax Studd to be an infant within the meaning of ss. 1 and 3 (1) of the Betting and Loans (Infants) Act, 1892, and that there was no evidence that the circular the subject of the information was sent to any person at a university, college, school, or other place of education within the meaning of s. 3 of the said Act.

The justices found that the circular was sent to E. F. Studd at the University of Cambridge and that the appellant must therefore be deemed to have known him to be an infant. They accordingly convicted the appellant subject to a case for the opinion of the Court.

Bodkin, for the appellant. The circular was not sent to the addressee "at any university." Those words are not satisfied by the letter being sent to any address in a university town. They must mean that it must be sent to such an address in a university town as would raise the presumption in the mind of the sender that the person residing there was an undergraduate and therefore probably a minor. And it is matter of common knowledge that undergraduates are only allowed to reside in colleges, halls or hostels, or licensed lodgings. But unless the appellant knew that 6, Benet Street was a licensed lodging-house there is nothing to raise the presumption that he

(1) By the Betting and Loans (Infants) Act, 1892, s. 1, "If any one for the purpose of earning commission reward or other profit sends or causes to be sent to a person whom he knows to be an infant any circular . . . . or other document which invites . . . . the person receiving it . . . . to apply to any person or at any place . . . . for information as to any race . . . . or other contingency upon which betting or wagering is generally carried on he shall be guilty of a misdemeanour."

Sect. 3: "If any such circular . . . . or other document as in the preceding sections or either of them mentioned is sent to any person at any university, college, school, or other place of education and such person is an infant, the person sending or causing the same to be sent shall be deemed to have known that such person was an infant, unless he proves that he had reasonable ground for believing such person to be of full age."

knew that the addressee was an undergraduate and therefore probably a minor. The essence of the offence at which the statute aims is sending the circular with guilty knowledge of the infancy, and guilty knowledge cannot be inferred from a particular fact as against a person who does not know of the existence of that fact. The sending must be such as to suggest that the sender knows that the address is one of the places prohibited by s. 3.

Haldinstein, for the respondent. The words "at any university" do not indicate a place, but the status of the addressee, namely, membership of the university. In common parlance an undergraduate is spoken of as being "at the university" irrespectively of where he may happen to be at the moment. It is in that sense that the words are used here, and in that sense the addressee was at a university. If that is not the meaning of the words it is difficult to see how the Act is to apply to a Scottish university such as Glasgow, for there the undergraduates do not reside in specially authorized houses, but wherever they please. And it is clear from s. 7 that the Act applies to Scotland.

Bodkin in reply.

BRAY J. The question is whether the appellant committed an offence against the Betting and Loans (Infants) Act, 1892. What he had done was to send a circular of the prohibited description to one E. F. Studd at 6, Benet Street, Cambridge, a house which was in fact, though not to the knowledge of the appellant, a lodging-house licensed by the university authorities. E. F. Studd was an undergraduate and an infant, but those facts were unknown to the appellant. In those circumstances did he commit an offence? Now s. 1 provides as an essential part of the offence which it creates that the sender of the document shall know the person to whom he sends it to be an infant. If the Act stopped there the appellant would clearly have committed no offence. But it goes on in s. 3 to say that certain facts shall be prima facie evidence that the sender did know of the infancy. When it is shewn that you know that a person is residing at a university as a member of it the presumption

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arises that you know him to be an infant. If you address a letter to a person at 6, Benet Street, Cambridge, and you know that that address is a licensed lodging-house, the presumption is that you know the person to whom the letter is addressed to be an infant, but if you do not know that it is a licensed lodging-house no such presumption, in my opinion, can arise. In my opinion the section should be read thus: "If any such circular is sent to any person at an address in a university town which would suggest that the sender knew that the person to whom it was sent is a member of the university, and such person is an infant, the person sending the same shall be deemed to have known that such person was an infant." Before the presumption of knowledge of the infancy can arise you must prove that the sender knew that the addressee was a member of the university or at least that he knew facts from which his knowledge of the addressee's membership of the university can be inferred. If the letter is addressed to Trinity College, Cambridge, that is, of course, enough without more. But if it be sent to a private house the sender must have known it to be a licensed lodging-house. It was suggested that the words "person at any university" mean "person who is at any university." But that construction would give rise to great difficulty, for if a letter were sent to a private address in London to a person who turned out to be a member of a university, the sending of it would be an offence although the sender did not know the person to be a member of a university. And that is not what the Act aimed at. I think the appeal should be allowed.

CHANNELL J. I am of the same opinion. I am sorry to have had to come to that conclusion, for I fear that it may be productive of mischief. But we have got to deal with the statute as we find it. Sect. 1 requires as an essential ingredient in the offence that the sender of the document should know the person to whom it is sent to be an infant. Then s. 3 imputes that knowledge to the sender under certain circumstances. But it is impossible to impute that knowledge unless the circumstances which give rise to the imputation are themselves known to the sender. Now one of the circumstances which give rise to that imputation is that

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the document is "sent to any person at any university." Those words must, I think, mean "sent to a person at an address which the sender knows to be part of a university." And the finding of the justices was that the appellant had no knowledge that 6, Benet Street was a part of the university, in the sense of a place where undergraduates might be expected to be found residing. The address itself was in that respect wholly ambiguous, and it would be improper to infer from it any knowledge that it was a house where members of the university resided, though it may be that a person who knew Cambridge well might know that fact. I agree that the appeal should be allowed.

LORD ALVERSTONE C.J. I differ in this case with great hesitation, but I cannot see my way to putting so narrow a construction on the words "sent to any person at any university" as to treat them as meaning "knowingly sent to any person at any university." Such an interpretation would considerably cut down the effect of this beneficent legislation. I do not agree with Mr. Haldinstein's contention that the words "any person at any university" mean a person who happens to be a member of a university, and I quite accept my brothers' view that they are descriptive of the place to which the letter is to be sent. But to my mind it is enough that it should be sent to a place which is in fact part of a university, and that it is not necessary to shew that the sender knew that it was so. And I am fortified in this view by the concluding words of s. 3 that in the event of the circular being sent to a person at a university the sender shall be deemed to have known that such person was an infant "unless he proves that he had reasonable ground for believing" not that the address to which it was sent was not part of the university, but that "such person" was "of full age." In my opinion the justices were right.

Appeal allowed.

Solicitors for appellant: *Arthur Newton & Co.*
Solicitors for respondent: *Lee, Davis & Lee.*

J. F. C.

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April 22, 25;
May 2.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* WHITE.

Criminal Law—Indictment for Murder—Conviction for Attempt—Punishment—Criminal Procedure Act, 1851 (14 & 15 *Vict. c.* 100), *s.* 9—*Offences Against the Person Act*, 1861 (24 & 25 *Vict. c.* 100), *ss.* 11—15.

A person who upon an indictment charging him with murder is convicted under s. 9 of the Criminal Procedure Act, 1851, of an attempt to murder may be sentenced to penal servitude for life by virtue of the provisions of ss. 11—15 of the Offences Against the Person Act, 1861.

Appeal to the Court of Criminal Appeal.

The prisoner was tried at the Birmingham Assizes on an indictment charging that he on January 9, 1910, did murder one Mary Ann White.

The deceased, who was the mother of the prisoner, was on January 9, 1910, found dead in her house at Coventry. Upon a table by her side was a wine glass containing a species of lemonade with which a small quantity of cyanide of potassium had been mixed. The medical evidence went to shew that death was not due to poisoning. No trace of cyanide was found in the body. But the prisoner was proved to have purchased some cyanide of potassium shortly before; and there was evidence from which, as the Court held, the jury would be justified in inferring that the prisoner had put into the deceased's glass the cyanide that was found there and that he did so with intent to murder her. The liquid in the glass did not contain sufficient cyanide of potassium to have caused death if it had been swallowed. It contained at the most two grains, whereas the minimum fatal dose for an adult is five grains. The jury convicted him of an attempt to murder her, and the judge sentenced him to penal servitude for life. The prisoner appealed against conviction and sentence.

Maddocks, for the appellant. The sentence imposed was not justified by law. The judge had no power to impose a sentence of penal servitude at all. Had the prisoner been charged under

s. 14 of the Offences Against the Person Act, 1861, with attempting to cause poison to be taken by the deceased with intent to murder her the sentence would have been a valid one. But he was not indicted under that Act. He was indicted for murder, and upon such an indictment the only power to find the defendant guilty of an attempt to murder is under s. 9 of the Criminal Procedure Act, 1851. But the attempt of which a person may be convicted under that section is the common law offence of attempt to murder, which is a misdemeanour and is punishable with a maximum punishment of two years' imprisonment. Sect. 14 of the Offences Against the Person Act, 1861, is one of a group of sections (ss. 11—14) which are copied from the earlier Act of 7 Will. 4 & 1 Vict. c. 85, and down to 1861 the offences therein specified were not treated as attempts to murder. The word "attempt" was not used in the earlier Act. The offences dealt with were acts done with intent to murder, a class of acts which were always treated as distinct from attempts to murder. This distinction between acts done with intent and attempts is referred to by Kennedy J. in *Rex* v. *Linneker* (1), where he says "Although an attempt implies the intent, an intent does not necessarily imply an attempt"; and in the same case Walton J. said "It is clear that all acts done for the purpose of committing a crime are not attempts, for they may be merely acts of preparation." Of this the case of *Reg.* v. *Roberts* (2) is an illustration. It was there said that though the act of procuring dies to be used for the purpose of coining false money amounted to an attempt to coin false money, merely going to a particular town for the purpose of procuring such dies would not amount to such an attempt, the act not being sufficiently proximate to the commission of the offence intended. The case of *Reg.* v. *Connell* (3) is an authority in the appellant's favour. There the prisoner was indicted for murder and acquitted. She was subsequently put on her trial on the same facts on a charge of administering poison with intent to murder under 7 Will. 4 & 1 Vict. c. 85, and it was held that the previous acquittal could not be pleaded in bar of the indictment, which it could have been if the statutory

(1) [1906] 2 K. B. 99. (2) (1855) 7 Cox, C. C. 39.
(3) (1853) 6 Cox, C. C. 178.

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offence had been an attempt within the Criminal Procedure Act, 1851.

It is true that when the Act of 1861 came to be enacted the group of sections in question was headed with the words "Attempts to Murder." But that heading cannot have the effect of altering the well-recognized meaning which the words in the sections had already acquired. Those sections must still be treated as creating substantive statutory offences and not merely as imposing an increased penalty upon all attempts to murder. If that had been intended the obvious means of carrying out that intention would have been to enact a single section providing that whoever by any means shall attempt to commit murder shall be guilty of felony and suffer the punishment therein prescribed. By re-enacting the sections of the earlier Act the Legislature shewed an intention to keep the old distinction alive.

Further, even on the assumption that the prisoner put the poison in the glass in contemplation of causing his mother's death at a future date by administering a series of doses in the belief that they would have a cumulative effect upon the recipient, the act did not amount to an attempt, for it was not done with an intent then and there to kill. The form of indictment for administering poison invariably alleges that the poison was administered "with intent thereby *then* feloniously . . . . to kill and murder." And the evidence shewed that the quantity of cyanide in the glass was not sufficient to kill. He had a locus pœnitentiæ, and might have changed his mind before he had administered sufficient to cause death.

Ryland Adkins, for the Crown. The prisoner's act constituted an attempt to kill, even if it was designed as one of a series of acts of administering poison. The definition of an attempt is given in Stephen's Digest of the Criminal Law thus: "An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted." The facts in the present case come directly within that definition. No doubt, as Sir James Stephen points out, "The point at which such a series of acts begins cannot be defined; but depends upon the

circumstances of each particular case." Mere acts of preparation for the commission of the offence are not enough, but the putting of the poison in the glass goes far beyond an act of preparation. It is not necessary that the prisoner should have intended to kill there and then. The word "then," although it occurs in the indictment, is not to be found in the section which creates the offence. Moreover, here the prisoner may have been ignorant of the quantity of cyanide necessary to constitute a fatal dose, and may have thought that what he put in the glass would kill at once.

Then if there was an attempt to murder the sentence imposed was authorized by law, notwithstanding that the conviction was under the Act of 1851. Sects. 11—15 of the Offences Against the Person Act, 1861, include all possible kinds of attempts to murder, and every conviction for an attempt to murder under the Act of 1851 must come within one or other of those sections. (1) The case of *Reg.* v. *Connell* (2) is distinguishable from the present case, for it was decided under 7 Will. 4 & 1 Vict. c. 85, in which Act there was no section corresponding to s. 15. That Act did not apply to all possible attempts to murder, and therefore until 1861 it did not follow that, upon a conviction under the Act of 1851, the particular kind of attempt which formed the subject of the conviction was one for which the punishment of penal servitude was awarded. The Act of 1861, instead of codifying the law on the subject into a single section and enacting that all attempts to murder should be punishable with penal servitude, re-enacted the existing sections of the earlier Act and then by s. 15 extended their provisions so as to apply to all other kinds of attempts to murder. But the result is the same.

Maddocks in reply.

Cur. adv. vult.

(1) The Offences Against the Person Act, 1861, by ss. 11—14, deals with certain specific acts done with intent to murder, and also with attempts to do such acts with a like intent. It makes all such acts and attempts felony punishable with a maximum penalty of penal servitude for life. By s. 15 it provides that "Whosoever shall by any means other than those specified in any of the preceding sections of this Act attempt to commit murder shall be guilty of felony" and shall be liable to the same punishment.

(2) 6 Cox, C. C. 178.

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May 2. The judgment of the COURT (Lord Alverstone C.J., Bray and Pickford JJ.) was delivered by

BRAY J. In this case the appellant was indicted for the murder of his mother and was convicted of an attempt to murder her and sentenced to penal servitude for life. He appeals from this conviction on several grounds, which we will deal with one by one. First it is said that there was no reasonable evidence on which he could be convicted, or, as it is put in s. 4 of the Criminal Appeal Act, that the verdict cannot be supported having regard to the evidence.

The evidence put shortly was this. On January 9 last the mother was found dead in a sitting posture on a sofa in a sitting-room in her house. There was a round table standing two feet from the sofa, on the further side of which was a wine glass three parts filled with a liquid made up of a drink called nectar and, as was afterwards shewn, containing two grains of cyanide of potassium. There were also on the table a nectar bottle, two lumps of sugar, and a spoon. There was no evidence to shew that she had taken any of this liquid, and the result of the post mortem examination and of the analysis of the contents of the stomach and of the contents of the wine glass was to shew that she had not died from poisoning by cyanide of potassium, but that death was most probably caused by syncope or heart failure, due to fright or some other external cause, and further that the quantity of cyanide of potassium in the wine glass was, even if she had taken the whole, insufficient to cause her death. The appellant was proved to have bought cyanide of potassium on December 22 previous. He stated in his evidence that he bought it for case-hardening a chisel and that he had placed it in a cupboard in the room where the mother was found dead and that he thought it possible she might have taken it from there. The prisoner did not live in this house. No traces of any of this poison were found after her death either in the cupboard or in the house, nor of the newspaper in which the appellant said he had wrapped it. There was a good deal of evidence shewing that the appellant had a motive for killing his mother —namely, to obtain her money, she having made a will in his favour—and also shewing that the appellant had made several

statements previous to January 9 to the effect that he expected his mother's death, although in fact her state of health was not such as to shew that she was in any danger.

In our opinion the evidence was sufficient to warrant the jury in drawing the inference that the appellant had put the cyanide of potassium in the wine glass. It was strongly urged that even if this was so the smallness of the dose shewed that he could not have had the intention to murder her; but there was evidence that on some day between Christmas Day and the New Year the prisoner had produced to a witness, named Carden, from his pocket a small substance about the size of a marble, which appeared to him to resemble sugar candy, and stated that "This stuff is a deadly poison; a small quantity about the size of a pin's knob put into a little water would sober you" (i.e., the witness) "if you were drunk, instantly." There is no doubt he was referring to the cyanide of potassium which he had bought a few days previously. He therefore perfectly well knew the deadly character of this poison and supposed that a very small quantity would produce an instant effect. Upon consideration of all the evidence, including the denial of the prisoner that he had put anything into the wine glass at all, we are of opinion that there was sufficient evidence to warrant the jury also in coming to the conclusion that the appellant put the cyanide in the glass with intent to murder his mother.

The next point made was that if he put it there with that intent there was no attempt at murder; that the jury must have acted upon a suggestion of the learned judge in his summing up that this was one, the first or some later, of a series of doses which he intended to administer and so cause her death by slow poisoning; and that if they did act on that suggestion there was no attempt at murder, because the act of which he was guilty, namely, the putting the poison in the wine glass, was a completed act and could not be and was not intended by the appellant to have the effect of killing her at once. It could not kill unless it were followed by other acts which he might never have done. There seems no doubt that the learned judge in effect did tell the jury that if this was a case of slow poisoning the appellant would be guilty of the attempt to murder. We are

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of opinion that this direction was right, and that the completion or attempted completion of one of a series of acts intended by a man to result in killing is an attempt to murder even although this completed act would not, unless followed by the other acts, result in killing. It might be the beginning of the attempt, but would none the less be an attempt. While saying this we must say also that we do not think it likely the jury acted on this suggestion, because there was nothing to shew that the administration of small doses of cyanide of potassium would have a cumulative effect; we think it much more likely, having regard to the statement made by the prisoner to the witness Carden, that the appellant supposed he had put sufficient poison in the glass to kill her. This, of course, would be an attempt to murder.

We now come to the most difficult point, which was this—that under s. 9 of 14 & 15 Vict. c. 100, if the appellant were found guilty of attempting to murder, it would be a conviction of the common law offence of attempting to murder, and not of any of the special statutory offences under ss. 11—15 of 24 & 25 Vict. c. 100. If this point were a good one, the punishment would be only two years' imprisonment instead of penal servitude for life, which could be given in case of a conviction under any of the sections 11—15 of the Act of 24 & 25 Vict. c. 100. The argument on the part of the appellant was this: That ss. 11—15 of 24 & 25 Vict. c. 100 dealt with special offences, namely, ss. 11—13, doing certain acts with intent to murder, s. 14, attempting to do such acts with intent to murder, and s. 15, doing other acts not mentioned in the previous sections with the like intent; that these were made special statutory offences distinct from the common law offence of attempting to murder; and that the attempt referred to in s. 9 of 14 & 15 Vict. c. 100 was the common law offence and not one of these special statutory offences. In support of this it was said that at the time of the passing of 14 & 15 Vict. c. 100, though the statutory offences comprised in ss. 11—14 of 24 & 25 Vict. c. 100 existed under earlier Acts, now repealed, they were not known as attempts to murder; they did not comprise all attempts to murder, there being no enactment having the effect of s. 15, and the only

offence known to the law as attempt to murder was the common law offence, and that must have been the offence contemplated by that Act. Further, it was argued, in proceedings under ss. 11—15 of 24 & 25 Vict. c. 100 the indictment must state the particular offence under the particular section; there could not be one indictment charging the different offences under each of the sections alternatively; and that the result of holding that under an indictment for murder a man could be convicted of one of these special statutory offences would enable the prosecution to include in one indictment a number of special statutory offences, and that if that had been intended it would have been enacted by 24 & 25 Vict. c. 100, "Whosoever shall by any means attempt to murder shall be guilty of felony," &c. Finally it was argued that there was a difference between doing an act with intent to murder and attempting to murder. In support of all these points great reliance was placed on *Reg.* v. *Connell.* (1)

The argument on the part of the prosecution was that the Act 24 & 25 Vict. c. 100 for the first time dealt comprehensively with all attempts to murder and made them all felonies and all punishable with the same maximum punishment, namely, penal servitude for life, so that after the passing of 24 & 25 Vict. c. 100, on a conviction for attempt to murder under 14 & 15 Vict. c. 100, the conviction was a conviction under 24 & 25 Vict. c. 100 and punishable with penal servitude for life; that although this might have the effect of including in one indictment several special statutory offences, that was the necessary consequence and effect of the Act 24 & 25 Vict. c. 100, and if it were not so, there must in every case where there was a failure to prove the charge of murder be a fresh indictment and a fresh trial on exactly the same evidence which would lead to the same result, and that this was the very mischief which the Act of 14 & 15 Vict. c. 100 was intended to remedy, and that no hardship on the prisoner would result; no new evidence would be introduced, and he would be convicted of the attempt on the same evidence which was relied on to prove the complete offence. As to the last point, it was said that there could not be an attempt to murder unless there was an intent to murder, so

(1) 6 Cox, C. C. 178.

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that if a prisoner were convicted by the jury of an attempt to murder he must necessarily have been convicted of an offence within one of the sections 11—15 of 24 & 25 Vict. c. 100.

After full consideration, and having had the advantage of hearing a most able argument from Mr. Maddocks, we have come to the conclusion that the reasoning of the prosecution is sound and must prevail. We will deal first with *Reg.* v. *Connell.* (1) The ground of that decision seems to be that the record would merely shew a conviction for an attempt to murder, and it would be consistent with the record that the attempt had been by some means other than those mentioned in the special statutory offences, which at that time (1853) did not include an offence under s. 15. It might be, therefore, that the prisoner was convicted of an offence which was only punishable as a common law misdemeanour, and there would be no authority for the statutory punishment; it would be consistent with the record that the man should have been sentenced to penal servitude for life when he had only been guilty of a common law misdemeanour. We think *Reg.* v. *Connell* (1) may be distinguishable on these grounds; but the passing of 24 & 25 Vict. c. 100 removed this difficulty. That Act was intended as a code for all attempts to murder. This group of sections 11—15 is headed with the words "Attempts to Murder," and these words fortify the conclusion at which we have arrived. After the passing of that Act all attempts at murder necessarily fell within one of these five sections. If that Act had provided in so many words that all attempts to murder should be punishable with penal servitude for life, the effect of such an enactment on s. 9 of 14 & 15 Vict. c. 100 must have been that if the prisoner were convicted of the attempt to murder penal servitude for life could be awarded, and ss. 11—15 of 24 & 25 Vict. c. 100 substantially were such an enactment. It is not a sound argument that if that had been intended there would have been that one section, and that alone, because we know that in Acts which are intended to consolidate as well as to amend the law it is the practice to re-enact sections of the repealed Acts, and then to fill up any gap, rather than frame new sections in new language.

(1) 6 Cox, C. C. 178.

By the time the consolidation Act comes the language of the old sections has often been judicially interpreted, and it is desirable to use the same language. We think that no such inference as was suggested by Mr. Maddocks can be drawn from the absence of the simple provision that all attempts to murder should be punishable with penal servitude for life. As to the difference between acts which are attempts to murder and acts which are done with intent to murder, we feel some difficulty in accepting what Kennedy J. says in *Rex* v. *Linneker* (1); but, however that may be, it is sufficient to say, as we have already said, that all the offences in ss. 11—15 are treated as attempts to murder, and there cannot be an act done with intent to murder without its being an attempt to murder, and a prisoner cannot be convicted under s. 9 of 14 & 15 Vict. c. 100 unless, as here, the jury have found him guilty of an attempt to murder. For these reasons we think the appeal fails and must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Maddocks, Ogden & Co., Coventry.*
Solicitor for the Crown: *Director of Public Prosecutions.*

(1) [1906] 2 K. B. at p. 103.

J. F. C.

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March 23

METROPOLITAN WATER BOARD *v.* BROOKS.

Waterworks—Water Rate payable by Owner—Prohibition against cutting off Tenant's Water Supply—Recovery of Water Rate from "Owner"—Receiver of Rents—Water Companies (Regulation of Powers) Act, 1887 (50 & 51 *Vict. c.* 21), *s.* 4—*Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 3, 72.

By a special Act of a water company it was provided that "The owners of all houses or parts of houses occupied as separate tenements and not respectively exceeding the annual value of 20*l.* shall during such time as they are supplied with water by the company be liable to the payment of the rates chargeable in respect thereof under this Act instead of the occupiers thereof; and the person receiving the rent of any such house or tenement from the occupier thereof on his own account or as agent or receiver for any person interested therein shall for that purpose be deemed the owner of such house or tenement." The special Act incorporated the Waterworks Clauses Act, 1847, by s. 3 of which "The expression 'water rate' shall include any rent reward or payment to be made to the undertakers for a supply of water."

By s. 4 of the Water Companies (Regulation of Powers) Act, 1887, "Where the owner and not the occupier is liable by law or by agreement with the water company to the payment of the water rate in respect of any dwelling-house or part of a dwelling-house occupied as a separate tenement, no water company shall cut off the water supply for non-payment of the water rate, but such water rate, without prejudice to the other remedies of the company for enforcing payment thereof from such owner, shall . . . . be a charge on such dwelling-house in priority to all other charges affecting the premises; and (without prejudice to such charge) the amount may be recovered . . . . from the owner or from the occupier for the time being in the same manner as water rates may by law be recovered."

The owner of a block of flats, which were respectively of an annual value not exceeding 20*l.*, entered into an agreement with a water company for the supply of water to the flats by meter. The owner subsequently mortgaged the premises, and upon his getting into financial difficulties the mortgagees appointed the defendant to act as receiver of the rents of the flats on their behalf. At the date of the defendant's appointment there were arrears owing to the plaintiffs (the successors of the water company) for water supplied to the flats under the agreement:—

Held, that the defendant was not the owner of the premises within the meaning of s. 4 of the Water Companies (Regulation of Powers) Act, 1887, and was not liable as such for the arrears existing at the date of his appointment.

Trial of action before Channell J. without a jury.

By the Metropolis Water Act, 1902, the plaintiffs acquired the

undertaking, amongst others, of the East London Waterworks Company, including the powers and duties of supplying water to the district in which the premises hereinafter mentioned are situate in accordance with the provisions of the East London Waterworks Act, 1853 (16 & 17 Vict. c. clxvi.), which Act incorporated the whole of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), with the exception of certain clauses which are not material to the present case. By s. 74 of the above-mentioned special Act the company were authorized to charge for a supply of water for domestic purposes a water rate of 5*l.* per cent. on the annual value of the house supplied, with a further charge for high service (s. 76). By s. 80 it was provided that "Notwithstanding any of the provisions of this Act the company may take an increased rate or charge by agreement with any person or body requiring a supply of water and notwithstanding the same exceed the rates or charges in this Act specified." And by s. 81 "The owners of all houses or parts of houses occupied as separate tenements and not respectively exceeding the annual value of 20*l.* shall during such time as they are supplied with water by the company be liable to the payment of the rates chargeable in respect thereof under this Act instead of the occupiers thereof; and the person receiving the rent of any such house or tenement from the occupier thereof on his own account or as agent or receiver for any person interested therein shall for that purpose be deemed the owner of such house or tenement."

In the year 1903 one Abraham Davis, a builder, who was then engaged in building six large blocks of residential flats on leasehold sites in Morgan Street, Commercial Road, known as Nos. 1 to 6 Morgan Mansions, entered into agreements with the East London Waterworks Company under s. 80 of the special Act for the supply of water by meter to the said six blocks at a rate of 1*s.* per thousand gallons with a minimum quarterly rate of 82*s.* There were six separate agreements, one in respect of each block. From the dates of the said agreements water has been continuously supplied to the premises by meter down to the present time, at first by the East London Company, and since June 24, 1904, by the plaintiffs. The payments for this supply of water

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were made by Davis in accordance with the agreements from the date of the agreements down to and including Midsummer, 1904. No payment has been made in respect of the water supplied since Midsummer, 1904. The several flats or tenements of which Nos. 1 to 6 Morgan Mansions consist are all, with a few exceptions, of a rateable value not exceeding 20*l*. In May, 1903, Davis mortgaged the three blocks numbered 1, 2, and 3 Morgan Mansions to the Norwich Union Life Insurance Society, and in August, 1903, he mortgaged the remaining three blocks to the same society. In May, 1905, the payments under the above water agreements being in arrear, an action was brought by the plaintiffs against Davis for the sums due from him for the four quarters to Midsummer, 1905, and a further action was brought against him in November, 1905, for the subsequent arrears to Michaelmas of that year. Before these actions could be tried it was ascertained that the mortgagees had actually taken or were on the point of taking possession of the premises, and the actions were accordingly abandoned. By an indenture dated August 11, 1906, Davis, the mortgagor, with the consent of the society as mortgagees, appointed the defendant to be the receiver of the rents and profits of the premises and to stand possessed of the rents and profits so received upon trust to pay thereout the rent payable under the indentures of lease under which the properties were held, and also all outgoings payable by the mortgagor as lessee or by persons deriving title under him, and also all rates and taxes and other outgoings whatsoever affecting the mortgaged property, and to retain for his own use as remuneration for his services a sum not exceeding 5 per cent. on the gross amount of the rents, and after making such payments and allowance upon trust to pay to the society the interest on the principal moneys due to them and to pay the surplus of the rents to the society or to a bank at their option as a fund to provide the future interest accruing to the society. Upon his being so appointed as receiver the defendant commenced to receive the rents and profits of all the flats or tenements comprised in Nos. 1 to 6 Morgan Mansions with the exception of four tenements in one of the blocks, and thenceforward continued to receive them and to perform the trusts of the indenture.

The tenants of the flats, which were held under weekly tenancies, paid their rents, except in the cases of the four tenements above mentioned, directly to a collector named Smith, who handed over the moneys received by him to the defendant. In July, 1908, there was due to the plaintiffs the sum of 175*l.* under the agreements for the supply of water to Nos. 1 and 2 Morgan Mansions from Midsummer, 1904, to Lady Day, 1908, and the plaintiffs issued two summonses in the Westminster County Court for the recovery of the same against the defendant, claiming that he was liable as being the owner of the premises within the meaning of s. 4 of the Water Companies (Regulation of Powers) Act, 1887 (50 & 51 Vict. c. 21). Before the actions came on for hearing they were removed by certiorari to the High Court. A statement of claim was delivered in which the plaintiffs claimed for the arrears in respect of all the six blocks of tenements from Midsummer, 1904, to Lady Day, 1908, amounting to 468*l.* 12*s.*, as being due under the agreements for the supply of water by meter; and in the alternative they claimed the sum of 498*l.* 3*s.* 3*d.* as the amount of water rate due under s. 74 of the special Act at 5 per cent. upon the annual value of the premises. The defendant was ready and willing to pay the amount which had accrued due under the agreements in respect of the premises since August 11, 1906, the date of his appointment as receiver, but refused to pay the amount which had accrued before the date of his appointment.

Danckwerts, K.C., and *A. B. Shaw*, for the plaintiffs. The defendant is liable for the arrears due in respect of the period between Midsummer, 1904, and August, 1906, as well as for the amount which has accrued during the period of his receivership. Previously to 1887 one remedy of a water company in all cases of non-payment of water rates was to cut off the supply, a remedy which operated harshly upon the occupiers in cases in which the landlord and not the occupier was liable for the rates. By the Water Companies (Regulation of Powers) Act, 1887 (50 & 51 Vict. c. 21), s. 4, it was provided that "Where the owner and not the occupier is liable by law or by agreement with the water company to the payment of the water rate in respect of any

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dwelling-house or part of a dwelling-house occupied as a separate tenement no water company shall cut off the water supply for non-payment of the water rate, but such water rate, without prejudice to the other remedies of the company for enforcing payment thereof from such owner, shall, together with interest thereon at the rate of five pounds per centum per annum computed from the expiration of one month from the time when the same has been claimed by the company until receipt thereof by the company, be a charge on such dwelling-house in priority to all other charges affecting the premises; and (without prejudice to such charge) the amount may be recovered with the costs incurred from the owner or from the occupier for the time being in the same manner as water rates may by law be recovered." The effect of that section was held in *East London Waterworks Co.* v. *Kellerman* (1) to be that a purchaser of a freehold dwelling-house (the rent of which did not exceed 20*l.* and the water rate of which under the East London Waterworks Act, 1853, s. 81, was payable by the owner and not the occupier) was liable to be sued for arrears of water rate which had accrued due before the date of the purchase. Similarly in *Lambeth Waterworks Co.* v. *Richardson* (2), where the owner of a row of houses (the rents of which exceeded 10*l.* and the water rates of which were by law payable by the tenant) "farmed" the water rates and paid the company a certain sum per annum in respect of them, upon his superior landlord successfully bringing an action against him to recover possession of the premises, it was held that the landlord was liable under the section for arrears of water rate accrued due before the date of the recovery. And in the present case the defendant, as the receiver of the rents and profits, is the "owner" within the meaning of the section by virtue of s. 81 of the East London Waterworks Act, 1853, which section, except that the maximum value of the houses to which it is to apply is 20*l.* instead of 10*l.*, is in practically identical terms with s. 72 of the Waterworks Clauses Act, 1847.

Avory, K.C., and *Giveen*, for the defendant. The defendant

(1) [1892] 2 Q. B. 72.

(2) Cited in Michael and Will on the Law Relating to Gas and Water, 5th ed., p. 373.

is not the "owner" within the meaning of the Act of 1887. In the absence of any indication in that Act to the contrary the expression "owner" in s. 4 must be understood in its ordinary sense, and not in the artificial sense in which the word is used in s. 81 of the special Act. Though s. 3 of the Act of 1887 provides that "This Act shall apply to every water company which is a trading company supplying water for profit and to which any of the provisions of the Waterworks Clauses Act, 1847, have been or shall be made applicable by any special Act . . . . and every such special Act . . . . shall be deemed to be amended by this Act and shall be construed accordingly," it does not say that the Act is to be incorporated in the special Act, or that the two Acts are to be read together as one Act. But even if the definition of owner in the special Act is to be read into s. 4 of the Act of 1887 it will not render the defendant liable. For under the special Act "owner" is to include "receiver" only in the cases to which s. 81 applies, namely, the cases in which, the rents of the houses being small, the liability for the water rate is imposed upon the owner by law whether he wishes it or not. That section (s. 81) has no application to a case where the owner has by agreement with the company voluntarily undertaken the liability. The result will be that the word "owner" in s. 4 of the later Act is used in a wider or narrower sense according as "the owner and not the occupier is liable by law" or "by agreement with the water company." The only person who is liable here by agreement is Davis. He made the contracts for supply by meter, and the liability of those contracts has never been transferred to the defendant. *Kellerman's Case*(1) is no doubt an authority that the Norwich Union are liable for the arrears of water rates, but not that the defendant is liable. There is no hardship in imposing the liability for arrears upon a purchaser, for he knows that he is buying subject to any incumbrances upon the property. But with a receiver it is a different matter. By his appointment he takes no interest in the premises whatever, and to hold him personally liable for arrears accrued before the date of his appointment would involve a serious hardship.

(1) [1892] 2 Q. B. 72.

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Danckwerts, K.C., in reply. The defendant ought to have inquired whether there were any arrears before he accepted the receivership. The distinction between cases in which the "owner" is liable for the rates by law and those in which he is liable by agreement is ill founded. Sect. 3 of the Waterworks Clauses Act, which is incorporated in the special Act of 1853, defines "water rate" to include "any rent reward or payment to be made to the undertakers for a supply of water"; that is to say, it includes any payment for water supplied of which the amount is fixed by agreement; and the provision in s. 81 of the special Act (and in s. 72 of the Waterworks Clauses Act) that the receiver of the rents shall be "liable to the payment of the rates," when read by the light of the above definition, makes the receiver liable to pay for water supplied during the period of his receivership under an agreement made with the owner. In other words the effect of those sections is to operate as a statutory assignment of the contract. That being so, s. 4 of the Act of 1887 extends the liability of the receiver so as to include the arrears for water similarly supplied before his receivership began.

CHANNELL J. This is a claim by the Metropolitan Water Board against the defendant for arrears of payments for the supply of water to certain flats. The flats had been built by a Mr. Davis, who in 1903 entered into agreements with the East London Waterworks Company, the predecessors of the plaintiffs, for a supply of water to those flats by meter. The company were not compellable to supply water for domestic purposes by meter, and the supply was therefore entirely under those agreements. It was provided by the agreements that they might be determined by a six months' notice. But they have never been determined, and the water has continued to be supplied under them; and until they have in fact been determined the plaintiffs cannot claim payment upon the basis of the rateable value of the premises, which would be the ordinary basis of payment if there were no agreements.

In the year 1905 Davis, who had mortgaged the whole of the flats to the Norwich Union Life Insurance Society, with the exception of four flats in one of the blocks which he had

mortgaged to other persons, got into financial difficulties, and Mr. Brooks, the present defendant, was appointed to be receiver of the property on behalf of the Norwich Union, and in that capacity he received the rents of substantially the whole of the flats. Davis had allowed the payments for the supply of water to the flats to get into arrear, and at the date of the defendant's appointment as receiver a considerable sum was due to the plaintiffs for water supplied under the agreements. In those circumstances the question arises whether the defendant is personally liable for those arrears. It is not contended that he could be liable upon Davis's agreements otherwise than by virtue of the statutes relating to this matter, and those statutes it becomes necessary to consider. The Waterworks Clauses Act, 1847, which was incorporated by the East London Waterworks Act, 1853, provided by s. 3 that "The expression 'water rate' shall include any rent reward or payment to be made to the undertakers for a supply of water." Assuming that that definition applies, the expression "water rate" would cover payments for the supply of water by meter under such an agreement as that made by Davis. Then s. 81 of the special Act of 1853 provides that "The owners of all houses or parts of houses occupied as separate tenements and not respectively exceeding the annual value of 20*l.* shall during such time as they are supplied with water by the company be liable to the payment of the rates chargeable in respect thereof under this Act instead of the occupiers thereof; and the person receiving the rents of any such house or tenement"—that is one of a less annual value than 20*l.*—"from the occupier thereof on his own account or as agent or receiver for any person interested therein shall for that purpose be deemed the owner of such house or tenement." That section is practically in identical terms with s. 72 of the general Act of 1847, except that the latter simply says that the receiver "shall be deemed the owner of such house or tenement," whereas the special Act says "shall for that purpose be deemed the owner of such house or tenement." But I do not think that the absence of the words "for that purpose" in the general Act makes any difference. I think that the general Act means what the special Act in terms says, that the receiver

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is to be deemed the owner for the purpose indicated by the section; and that purpose is to give the company a remedy, in cases where the tenements supplied with water are small in value, against the owner as being a more substantial person than the occupiers, and at the same time, in order to avoid the difficulty of tracing the title and finding out who the real owner is, to enable the company to treat the person who actually receives the rents as if he were the owner and pursue their remedy against him. Whether under the special Act or under the general Act, it is for that purpose and for that purpose alone that the receiver is to be deemed to be the owner. In the present case it is conceded that, with a very few exceptions, all the tenements in these six blocks of flats were respectively of an annual value not exceeding 20*l*. Therefore the defendant as being the receiver of the rents of those tenements was to be deemed the owner for the purpose I have mentioned. I now turn to the Act upon which the question in this case mainly depends, the Water Companies (Regulation of Powers) Act, 1887. Sect. 3 of that Act says: "This Act shall apply to every water company which is a trading company supplying water for profit and to which any of the provisions of the Waterworks Clauses Act, 1847, have been or shall be made applicable by any special Act . . . . and every such special Act . . . . shall be deemed to be amended by this Act and shall be construed accordingly." Now that does not say in terms that the two Acts are to be read together as one Act, nor does it say in express terms that the meanings of words in the former Act are to be the meanings of similar words in this Act. But it seems to me that that must be the effect of the section. You cannot well treat the special Act as amended by this Act without applying the same rules of construction to this Act as you would if the words were in the other Act. That is to say you do not necessarily give to the words "water rate" or "owner" in whatever context they may be found the meanings that in some parts of the special Act those words have; but you are entitled to give those meanings to the words if it is necessary in order to construe this Act effectively with the other Act and as an amendment of it. That being so, we have to consider the next section,

s. 4, upon which the whole matter really turns. That section says "Where the owner and not the occupier is liable by law or by agreement with the water company to the payment of the water rate in respect of any dwelling-house or part of a dwelling-house occupied as a separate tenement no water company shall cut off the water supply for non-payment of the water rate." That is intended to be in relief of the occupiers, to prevent the supply being cut off from occupiers who are not in default by non-payment. And I think it is clear that that provision applies to a case like the present, where the payment for the water is to be by meter, notwithstanding that the section speaks only of payment of the water rate. To that extent I think it is necessary to read the meaning in the special Act into the Act of 1887, because you could not possibly carry out the obvious intention of the Legislature in stopping the water company from cutting off the supply to these flats unless you treated this as a case where by agreement with the water company the payment of the water rate is to be by the owner instead of the occupier. That being so, the plaintiffs cannot cut off the water supply for non-payment of the money due under the agreement for supply by meter. But those sums are, without prejudice to the other remedies of the company to enforce payment of them, to be "a charge on such dwelling-house in priority to all other charges affecting the premises." So far the interpretations of the special Act apply to the Act of 1887. Then we come to the words which it is said make the defendant liable: "and the amount may be recovered . . . . from the owner or from the occupier for the time being in the same manner as water rates may by law be recovered"; and water rates may, where the amount due exceeds 20*l.*, be recovered by action. There is no doubt that if the defendant is liable at all the liability is one which may properly be enforced by action. But the question is whether, by virtue of s. 81 of the special Act, he is to be deemed to be the owner for the purposes of s. 4 of the Act of 1887. As I have already said, the definition of the word "owner" in s. 81 is not necessarily to be applied wherever the word is met with, and particularly as the section expressly says that it is only to be applied for the purpose specified

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in the section. What then is the meaning of the words "from the owner or from the occupier for the time being"? The case of *East London Waterworks Co.* v. *Kellerman* (1) decides two points that are material to this question—first, that the words "for the time being" apply not merely to the word "occupier," but also to the word "owner," and, secondly, that a person who comes within the description of an owner for the time being is liable not merely for the sums that accrue during the time when he is owner, but also for the arrears due from his predecessor at the time when he came into the ownership. This remedy by action against the owner for the time being is intended as a convenient way of enforcing the charge given by the preceding clause. Under these circumstances the question is whether "owner" there does not necessarily mean a real owner who has got property which is charged, or whether it can be applied to a mere constructive owner such as the receiver of the rents and profits. I think it means the former, and that a person who is merely a constructive owner as receiver or manager was not intended to be made personally liable to a charge existing antecedently to the time when he began to collect the rents. I think that would be so even where the charge for the water supplied was by a water rate, in the ordinary sense of that term, the amount of the charge being based on the annual value of the premises, and where, by reason of the premises being of a less annual value than 20*l*., the owner was liable for that water rate instead of the occupier; and in the present case the difficulty of holding the defendant liable is still greater, for it would involve making him liable for sums due under an agreement to which he was not a party. Moreover, in the present case there is this further difficulty, that there are in one of the blocks a few tenements of which he does not receive the rents and of which therefore he cannot in any sense be regarded as the owner. But the sum payable for the water under each agreement is a lump sum payable in respect of the whole block to which it applies, and there might be a difficulty in apportioning the liability. But even if it could be apportioned you would have to read the word "owner" in the Act of 1887 as meaning

(1) [1892] 2 Q. B. 72.

"owners." All the owners would be liable, and in order to apportion the liability between them you would have to have them all before the Court. That is, I think, an additional reason for holding that for the purpose of that Act you cannot read the word "owner" as including a receiver or agent. On these grounds I think the action fails.

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Judgment for defendant.

Solicitor for plaintiffs: *Walter Moon.*
Solicitors for defendant: *Hartcup, Davis & Co.*

J. F. C.

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Oct. 27.

Marine Insurance—Policy—Warranty—"Free from particular average and loss"—Meaning of—Understanding amongst Underwriters.

A policy of marine insurance upon frozen meat expressed the period of the risk to be as follows: "Risk commencing at the freezing station works and includes a period of not exceeding sixty days after arrival of the vessel." It also contained the following clause:—"Warranted free from particular average and loss unless caused by stranding sinking burning or collision of the ship or craft." Owing to causes arising during the voyage other than the stranding, sinking, burning, or collision of the ship the meat arrived in such a condition that it had to be condemned as unfit for human food, and was consequently a total loss.

Hamilton J. found as a fact upon the evidence of underwriters that the words "Warranted free from particular average and loss" were a well-known formula used in connection with the insurance of frozen meat; that the words "and loss" in that formula were well understood amongst underwriters to mean all loss, total as well as partial; and that the clause, however inapt to express that meaning, was in fact intended to mean that the underwriters only undertook the marine risks of stranding, sinking, burning, or collision. He held that, notwithstanding the provision as to the risk commencing before and continuing after the termination of the voyage, the clause had that meaning in this policy, and he accordingly held that the underwriters were not liable for the loss.

TRIAL before Hamilton J. without a jury.

The action was for a total loss under a policy of marine insurance on frozen meat carried on board the ship *Surrey*. The risk

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insured by the policy was expressed to be "at and from Port Chalmers to Glasgow, risk commencing at the freezing station works and includes a period of not exceeding sixty days after arrival of the vessel," the subject-matter being 1489 cases of boned beef valued at 1116*l*. The policy, which was in the ordinary Lloyd's form, contained the following clause (partly in print and partly in writing) attached to it:—"Warranted free from particular average and loss unless caused by stranding sinking burning or collision of the ship or craft (the collision to be of such a nature as may reasonably be supposed to have caused or led to the damage claimed for) but to pay landing warehousing forwarding and special charges if incurred; also partial loss arising from transhipment, including all risk of craft or otherwise to and from the vessel, each craft or lighter to be deemed a separate insurance." The policy was also expressed to be "subject to Institute clauses attached as far as they apply." Amongst the Institute clauses so attached were the following:—"The risk commences at the freezing works at . . . . includes (except as hereinafter mentioned) all risks of freezing and all risks from freezing works until on board the vessel and unless previously terminated continues on board the vessel and/or in refrigerating stores in the United Kingdom (such stores to be approved by the Institute of London Underwriters) for a period not exceeding sixty days from arrival of the vessel," and "The insurance covers loss from defective condition of the meat from every cause (except improper dressing) which shall arise during the currency of the insurance." The action was tried without pleadings upon the following agreed statement of facts:—That at the inception of the risk the 1489 cases of beef insured were all in good order and condition; that on arrival at Glasgow the whole of the contents of the said 1489 cases were in such a condition that they were seized by the sanitary authorities at Glasgow and condemned by the magistrate of Glasgow as unsound and unfit for human consumption and ordered to be destroyed, and that they were sold for the purpose of being used in the manufacture of manure; that the condition of the meat was not caused by improper dressing; that it arose on board the *Surrey*: that it did not arise from transhipment; that the *Surrey*

was not stranded, sunk, burnt, or in collision, nor was any craft conveying the said meat. At the hearing evidence was given by a number of underwriters on behalf of the defendant that it had been for some years a general practice amongst underwriters when underwriting an f.p.a. risk on frozen meat to insert after the words "warranted free from particular average" the words "and loss," those words "and loss" being well understood to include total as well as partial loss, and their use being designed to guard against loss by breakdown of machinery or from inherent vice. The witnesses said that the warranty was intended to exclude the underwriters' liability for all loss not caused by the marine risks of stranding, sinking, burning, or collision, or of transhipment, or of carriage on craft to or from the vessel, or unless the loss were general average. They at the same time admitted that it was customary to pay for a loss by fire occurring within the sixty days of the arrival. The ordinary rate of premium for a policy covering an f.p.a. risk which left the underwriter liable for a total loss would be 40*s.*, whereas the policy sued on was effected at 12*s.* 6*d.*

Scrutton, K.C., and *F. D. Mackinnon*, for the plaintiffs. The risk covered by this policy is that specified in the Institute clauses attached, except so far as it is cut down by the warranty. The insurance therefore covers the loss which has occurred unless it is excluded by the words "free from particular average and loss." But it is not so excluded. The words "and loss" mean "and particular loss." The warranty known as the f.p.a. clause is intended to apply only to particular average. The addition of the words "and loss" means nothing. They were never intended to shut out liability for total loss. If they were so intended to exclude liability for total loss, so that the underwriters would be under no liability for any loss unless caused by stranding, sinking, and the other marine risks therein specified, what possible meaning can be attached to the words "risk commencing at the freezing station works and includes a period of not exceeding sixty days after arrival of the vessel"? Those words were not part of the original printed form of the policy, in which case they might have been left in the policy per incuriam,

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but were expressly inserted in writing. They are wholly inconsistent with the notion that the underwriter is only to be liable for loss by marine risks.

Bankes, K.C., and *Maurice Hill*, for the defendant. Apart from any evidence as to the sense in which the words "and loss" in an f.p.a. clause are used by underwriters, it seems clear that they must include total loss. It must be assumed they were introduced for some purpose, whereas if they meant only a partial loss, as contended by the plaintiffs, they would be mere surplusage. Though particular average is a well-known term, no one ever heard the expression "particular loss." The plaintiffs want to omit the word "and" and read the words as if they were "free from particular average loss." If there were any doubt upon the point it would be removed by the evidence of the witnesses. The words "and loss" are purposely used to exclude liability for total loss unless caused by stranding, &c., and there is a general practice and understanding in that respect. Therefore the parties must be taken to have used the words in the sense in which they are generally understood among underwriters. Moreover, the low rate of premium at which the policy was here effected shews clearly that the parties did so understand them.

Scrutton, K.C., in reply.

HAMILTON J. This action is brought by the assured to recover a total loss upon a policy on frozen meat subscribed, among others, by the defendant. There are no pleadings, but the action is tried as regards the loss upon agreed facts. The cause of the loss was that the carcases arrived in such a condition that they were condemned as unfit for human food and had to be destroyed, and that condition arose some time during the voyage. They started in good condition, and the condition in which they arrived was not caused by improper dressing before sailing. Under the circumstances the question is one of construction of the policy, which is in the ordinary Lloyd's form, modified in two ways by having pasted upon it a printed f.p.a. clause, which in its turn has been altered by deleting some of the words with a pen and substituting some words in typewriting, and the policy is also modified by stating that it is

subject to the Institute clauses attached as far as they apply. By one of those clauses, "The insurance covers loss from defective condition of the meat from every cause (except improper dressing) which shall arise during the currency of the insurance." That would be incorporated by the reference into the body of the policy unless the words "as far as they apply" would exclude it. Under the circumstances the question is whether, having regard to the modified f.p.a. clause, the words "as far as they apply" prevent that clause from being read into the policy and leave the f.p.a. clause standing with such a meaning as to exclude any claim for the loss in question. The policy, as far as form goes, raises difficulties which are familiar to those who are accustomed to construe Lloyd's policies. The unfortunate, and I think the inevitable, result of the practice of relying on an ancient form modified by the attachment of printed clauses, which in their turn are again modified in writing, is to raise difficulties in construction, and a difficulty here arises upon the words "as far as the Institute clauses shall apply." The case has to be dealt with on the policy as it stands, and I think in all these cases the exact words used and the collocation of the words must be our only guides. There is no question of following any authority upon the particular construction of a particular instrument. The first question is upon the construction of the words in the body of the policy, and the plaintiffs say in terms that the risk commences at the freezing station works and includes a period not exceeding sixty days after the arrival of the vessel, and that the insurance is subject to the Institute clauses attached, including the one I have mentioned. Prima facie the loss is covered unless the warranty as modified excludes it. As a matter of construction the warranty is very ambiguously expressed, but it is contended on behalf of the plaintiffs that, upon the plain construction of it, it is confined to particular average, and does not deal with the case in question, which is a case of total loss. It is said that "warranted free from particular average and loss" means warranted free from particular average and from particular loss unless caused by one of the marine risks therein specified.

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It is pointed out that the clause as modified is very ambiguous because, apparently, in endeavouring to alter the printed words from a warranty free from particular average which would be deleted on the mere happening of the event of the ship or craft being stranded, sunk, on fire, or in collision into one which would be deleted only when the loss is caused by the stranding, sinking, burning, or collision of the ship or craft they have further added a different clause that there is to be a deletion if the nature of the collision is such as may reasonably be supposed to have caused or led to the damage claimed. They altered it very inartistically, and indeed confusedly, by having a co-existent provision that the deletion is to take place only if the loss is caused by a collision, and not merely that there has been a collision which might reasonably be supposed to have caused the loss. It is further pointed out that the words "including all risk of craft" in the printed form are left in, and the words as to the inclusion of "partial loss arising from transhipment" are also left in. As a matter of construction I am invited to say that this is an exceedingly inartistic f.p.a. clause. It contains redundancies; but then there are, of course, always redundancies if you have an f.p.a. clause grafted into a Lloyd's form, which makes the maximum warranty free from particular average under 3 per cent. It is pointed out it might be very difficult to ascertain, in case of collision, what exactly were the circumstances under which the f.p.a. clause would be deleted; but it is said as a matter of construction that it is a particular average clause and nothing else.

On the other hand it is said on behalf of the defendant that this can be construed quite reasonably as meaning "warranted free from particular average and from loss unless caused by the stranding, sinking, burning, or collision of the ship or craft," that that is the real meaning, and that anything else is repugnant to the words. I think at first sight one would have sought a way out of the difficulty by supposing that the word "and" between "average and loss" had got in by mistake, and that it should have run "free from particular average loss unless caused," but in the absence of any evidence of mutual or common error or claim for rectification I should be only

reforming the contract, and not interpreting it, if I did that, and, therefore, that short cut is not open to me. It seems to me as a matter of construction that the plaintiffs' construction is right, and I think the natural grammatical construction is "warranted free from particular average and particular loss." It is quite true that "particular loss," as far as I know, is a term unheard of in insurance, but it is perfectly good English. It is true also that if you warrant free from particular loss the words "free from particular average" are surplusage. But nevertheless it seems to me the natural construction is to attach to the word "loss" the same adjective which qualifies "average." Counsel for the defendant and the witnesses all agree that this is a policy against general average. But general average is only a special kind of loss, not as a rule total, caused by perils of the seas. Therefore when they say that the clause means "warranted free from particular average and free from loss," scilicet from all loss, they are contradicting the tenor of the policy, which it is admitted somehow or other gives the assured the right to recover for general average. If the object was to make this an insurance only against general average and a loss caused by the stranding, sinking, burning, or collision of the ship or craft, I think some less roundabout and less confused way of expressing it would have been chosen. As a matter of construction it appears to me that the plaintiffs' contention is right. Upon the body of the policy the premium is 12*s.* 6*d.* per cent., and evidence was given, without objection, to prove that 12*s.* 6*d.* was inadequate remuneration for undertaking the risk of total loss for the cargo going bad on the voyage. I accept the evidence of how much the underwriter ought to have charged with some doubt. Whether it is 40*s.* for all risks or for risks including defective condition of the meat, but f.p.a., I think it is clear as a matter of business that if the underwriter intended to insure against the risk now sued for in this action he would have asked for more than 12*s.* 6*d.* I am not asked to rectify this policy, they have taken their chance at 12*s.* 6*d.*, and I do not think the evidence given, though I accept it, affects the construction of the policy.

It is said, however, that although as a matter of grammatical

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English the defendant's construction fails, the words "warranted free from particular average and loss," &c., constitute a well-known formula used for a particular purpose and understood as expressing a particular meaning. It is a case in which a particular well-known phrase having a particular well-known meaning has been inserted, and it must be understood as having that meaning. Evidence has been given upon that by a number of underwriters, whose experience, capacity, and desire to assist the Court are beyond question. Their evidence is in the main in agreement, though it differs in some details. They say that this phrase which finds expression first of all in slips in the shape of "f.p.a. and loss except," or "f.p.a. and loss unless caused by," &c., or "f.p.a. and loss unless caused by s.s.b. and c."—cabalistic expressions which had been in use among individuals ten or fifteen years ago and in the last five or six years have come into use with respect to the heavy insurance on meat cargoes in respect of breakdowns at sea—they say it was intended to mean that the underwriter takes only marine risks, and that he is not only free from particular average unless it is caused by those risks of stranding, sinking, burning, or collision of ship or craft, but is also free from loss of the subject-matter, total or partial, unless caused in the same way. It is true that this matter does not appear to have been in controversy very much so far. One witness said specifically that he had not known of a case in which the point of total loss on board the ship, or total loss before the goods reached the ship or after they quitted it, was discussed. Another said he did not personally see the policies in which the slips, which were re-insurance slips, were expressed. He settled the form, and it was for his clerks to apply it. A third said distinctly the form used in this policy is the regular way in which this specific formula is expressed, which I accept, though I regret to hear it, and the other witnesses gave evidence to the same effect. This constitutes a considerable body of experience. Of course I am bound to distinguish carefully between witnesses who say that the underwriters use these words with the object of excluding particular liability and those who say that underwriters use these words with the meaning that a particular liability is excluded. The

defendant's witnesses all say that this is a well-recognized form expressing a well-recognized meaning, and they agree. The only evidence upon the other side is that of a witness who is experienced, no doubt, as an average adjuster, but as such he is one who deals with claims after loss, and whose experience one knows must be of claims adjusted to-day under risks written eighteen months or two years ago. His experience does not bring him into contact with the use of this form to any extent comparable to that used by the defendant's witnesses. No other witness was called on the other side, and they had no evidence from Lloyd's. Therefore I think I am justified in finding upon this evidence that these words have a particular meaning, well understood, and that that meaning is that the policy is warranted free from particular average and free from loss.

Now it is quite true that cases were put to these witnesses, some of which they answered illogically and some of which they could not answer at all. They say that underwriters disclaiming any knowledge of the law would under such a policy as this make a practice, they think, of paying for fire loss in store either before or at the end of the voyage. They say with some diffidence that the same course would be pursued if a fire took place on the quay during transhipment. They all say though the words mean "free from loss" they do not treat the policy as being free from general average, and then there is the fact that the policy in terms includes partial loss arising from transhipment and all risk of craft and otherwise to and from the vessel. I do not think it is necessary that I should discuss or decide what would be the rights of the parties if this loss had occurred before shipment or after arrival. These difficulties only go to the credibility of the witnesses; that is to say, they are only material for saying that there cannot be really any well-established meaning if there are cases that might arise on this policy which would not logically square with the witnesses' view of the words. I do not think, as a matter of fact, that the admission that general average is covered in spite of this formula, or the admission that fire would be paid for though it had not occurred by reason of the burning of the ship or craft, ought to lead me to doubt the accuracy of the witnesses in speaking uncontradictedly of the recognized meaning

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of the phrase. Then this does not quite conclude the matter, because, although the particular words may have in general a special meaning, I have to treat them as embodied in this policy, and it is therefore possible there may be something in the policy which, when construed all together, would make it impossible to attach to the words here that specific meaning which among underwriters they are understood to have. But I do not think on the construction of the policy for the purpose of this claim there is any such inconsistency. One would naturally, first of all, subordinate the Institute clauses on the fly-leaf of the policy to the words "as far as they apply," because, if the body of the policy contains a warranty which is inconsistent with the application of the Institute clauses, the Institute clauses go by the board. Secondly, as to the existence of the words left in the printed clauses which do not go with the typewritten words, and which produce a confused result, although not inconsistent with the typewritten words, I should attach primary importance to the words inserted by way of alteration rather than to the common form. But it appears to me that it may read thus: "Warranted free from particular average and free from loss unless caused by the stranding, sinking, burning, or collision of the ship or craft, except that particular loss arising from transhipment will be covered, and all risk of craft or otherwise to and from the vessel will be covered notwithstanding." There is a serious ambiguity with regard to the collision, and whether the words "caused by collision" mean the same thing as the occurrence of a collision which may reasonably be supposed to have caused the damage, but cannot be proved to have caused it, I express no opinion. As in point of fact the loss occurred on the voyage, it does not occur to me that the difficulty touches the case, nor does it appear to me that the fact that the assured would have difficulty in knowing how far he was covered in those respects touches the case either. I daresay he would have considerable difficulty in knowing how far he was covered under the words "risk commencing at the freezing station works" and whether he could sue for loss by fire there. In conclusion I think this policy is warranted free from not only particular average, but loss, including total loss, unless caused by events

which have not happened in this case. The result, therefore, is that there is judgment for the defendant with costs.

Judgment for defendant.

Solicitors for plaintiffs: *Thomas Cooper & Co.*

Solicitors for defendant: *Parker, Garrett, Holman & Howden.*

J. F. C.

SALTS *v.* BATTERSBY.

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April 19.

Landlord and Tenant—Rent—Assignment by Lessee of Part of Premises—Apportionment of Rent—Value of severed Parts—With reference to what date Value to be calculated.

Where, premises having been let at a rent, the lessee assigns part of the premises to another, the value of the respective parts with reference to which the apportionment of the reserved rent is to be calculated is the value at the date of the severance, not that at the date of the lease granted.

APPEAL from the county court of Manchester.

By a lease dated March 12, 1878, the Reverend Alfred Salts demised certain building land at Shaw, in the county of Lancaster, having an area of 17,600 square yards, to Robert Wood for a term of 999 years from November 1, 1877, at a yearly rent of 73*l.* 6*s.* 8*d.*, the lessee covenanting within two years to erect a number of dwelling-houses.

By an indenture dated March 24, 1878, Wood assigned the lease to J. S. Davenport and W. Lockett.

By an indenture of sub-demise dated August 27, 1878, J. S. Davenport and W. Lockett demised to Thomas Davenport a portion of the demised premises having an area of 860 square yards and herein called plot A for a term of 990 years from the date thereof at a yearly rent of 22*l.* 7*s.* 4*d.*

By an indenture of sub-demise dated December 2, 1878, J. S. Davenport and W. Lockett demised to W. Scott another portion of the demised premises having an area of 1772 square yards and herein called plot B for a term of 990 years from the date thereof at a yearly rent of 29*l.* 10*s.* 8*d.*

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By an indenture of assignment dated December 3, 1878, J. S. Davenport and W. Lockett assigned to J. A. Smith the two rents of 22*l.* 7*s.* 4*d.* and 29*l.* 10*s.* 8*d.* reserved by the said sub-demises and also the benefit of the said sub-lessees' covenants; but they did not assign the leasehold reversions to which those rents were incident.

By an indenture of assignment dated November 25, 1881, J. S. Davenport and W. Lockett assigned to J. A. Smith for the residue of the term of 999 years the whole of the premises demised by the head lease other than plots A and B, the assignors thereby covenanting to pay the rent of 73*l.* 6*s.* 8*d.* reserved by the lease.

By various mesne assignments the premises which were the subject of the assignment of November 25, 1881, herein called plot C, became vested in the defendant John Battersby, who on November 27, 1902, made a declaration that he held the premises in trust for Thomas Syms.

In 1909 Davenport and Lockett had disappeared, and the plaintiff, failing to get his rent, brought his action against Thomas Syms to recover one year's rent of the whole of the demised premises amounting to 73*l.* 6*s.* 8*d.* It appearing that Syms had no legal interest in the property, the county court judge added John Battersby as defendant and dismissed Syms from the action. The plaintiff still claimed the whole rent from the defendant. At the time of action brought plots A and B were built upon, but plot C was waste land and produced no rental. The judge held that the defendant was not liable for the whole rent, but only for a proportion, and that the way to apportion the amount to be paid by him was by ascertaining the proportion which the yardage of the land assigned to him bore to the yardage of the whole plot under the original lease. On that basis he gave judgment for the plaintiff for 64*l.* 8*s.* 3*d.* The defendant appealed.

Austen-Cartmell, for the defendant. Davenport and Lockett in their sub-demises to Thomas Davenport and Scott reserved to themselves leasehold reversions of about eight years and seven years respectively, and upon the assignment to Smith of the rents

reserved under those sub-demises they omitted, presumably by mistake, to assign to Smith those leasehold reversions. They consequently continued to be assignees of the entire term down to November, 1881, when they assigned to Smith so much of the term as related to plot C. They thereby severed the term, but they remained and still are assignees of so much of the term as relates to plots A and B. Under those circumstances the proper mode of apportioning the rent payable to the lessor as between the assignees of the severed portions of the term is to have regard to the relative values of the respective plots at the date when the term was severed in November, 1881. The county court judge was wrong in holding that the apportionment should be made with regard to yardage. The authorities are uniformly in favour of the view that an apportionment of rent must be based on the value. In *Smith* v. *Malings* (1) plaintiff in replevin, in answer to an avowry for an entire rent reserved on eighty acres of land, pleaded an eviction by title paramount from sixty acres of the land demised. The plea was held bad on demurrer because the plaintiff "ought to shew the value of the land so evicted, and how the rent ought to be apportioned." The same thing had been previously held in *Ewer* v. *Moyle* (2) and in an anonymous case. (3) In Gilbert on Rents, at p. 189, it is said, under the title "The Manner of Making Apportionment," "This is properly the business of a jury, who upon the evidence offered are to judge of the value of the lands purchased by the lord or lessor, or aliened by the tenant according to the Statute of Quia Emptores, &c., from whence it is for them to compute how much is due from the tenant for the residue of the lands in his hands. . . . . It is the business of the jury to determine whether anything and how much is due; and this is done with regard to the real value of the land remaining in his hands, and not with regard to the quantity of it." The rent then being apportionable according to value, that value must be ascertained as of the date when the term was severed. In *Hartley* v. *Maddocks* (4), where a grantor of land reserved to himself thereout a rent-charge in fee and the grantee was subsequently evicted

(1) (1608) Cro. Jac. 160.
(2) (1600) Cro. Eliz. 771.
(3) Pasch. 20 Eliz., Moore Rep. 114.
(4) [1899] 2 Ch. 199.

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by title paramount from part of the land, Cozens-Hardy J. held that the rent-charge ought to be apportioned "according to the respective values of the properties at the date of the eviction." The eviction in that case corresponds to the severance of the term in the present.

Manisty, K.C., and *Cyril Atkinson*, for the plaintiff. The date at which the values should be computed is the date of the lease granted. It is at that date that the amount of the lessor's rent is fixed. He does not get any more rent because the lessee improves a part of it. Why then should the fact of the lessee having improved a part of the land alter the position of the lessor in the event of the lessee assigning the unimproved portion to another person? In the present case then the date at which the value should be computed is March, 1878. At that date the whole of the land was unbuilt on and therefore was presumably all of the same value. If that was so the judge was right in basing the apportionment on yardage alone. But even if that contention is wrong, and if it was open to the defendant to shew that in 1881, when the term was severed, the land was not all of the same value, he did not give any evidence to establish that fact, and the cases of *Smith* v. *Malings* (1) and *Ewer* v. *Moyle* (2) shew that the onus lies on the tenant to prove what the value was.

Austen-Cartmell in reply. It is admitted that the onus lay on the defendant. But he took the point in the Court below that the proper principle was value and not yardage. The judge's expression of opinion that yardage was the right principle rendered it useless to call evidence of value.

DARLING J. The plaintiff in this case is the landlord, who is entitled to the reversion expectant on the determination of a long term of years in certain building land, which term became vested in two persons named Davenport and Lockett as tenants in common. In November, 1881, Davenport and Lockett, who had previously sub-let two small portions of the land (which have been called A and B) to certain other persons, assigned all their interest in the residue of the land to one Smith, and

(1) Cro. Jac. 160. (2) Cro. Eliz. 771.

the portion of the term which was so assigned to Smith is now vested in the defendant Battersby. Davenport and Lockett have disappeared, and the plaintiff, being unable to get any rent from them, sought to recover from the defendant the whole of the rent reserved by the lease. It is conceded that that claim is wrong and that the defendant, instead of being liable for the whole of the reserved rent, is only liable for so much of it as is properly apportioned to the land which he holds, and the only question which we have to decide is upon what principle the apportionment is to be made. It seems to me to be clear from the authorities that what you have to regard is not the bare acreage of the severed portions of the land demised, but their relative values. That I think is perfectly plain from the anonymous case in Moore and from the cases of *Smith* v. *Malings* (1) and *Ewer* v. *Moyle*. (2) You find the same principle running through them all. What you have got to ascertain is the value of the holding in the possession of the person from whom the rent is demanded as compared with the value of the whole of the demised land out of which that holding has been carved. The county court judge was of opinion that the proper way to apportion the rent was to have regard to the yardage and the yardage alone. Therein I think he was wrong. If it be shewn that the land is of equal value throughout, no doubt the apportionment must be on the basis of yardage. But yardage cannot be a sufficient test of the relative value by itself; and here, so far from there being evidence that the land was of equal value throughout, the evidence was the other way, plots A and B being covered with houses and the land in the possession of the defendant being unbuilt upon. The basis of the apportionment then being the value of the parts, the next question is at what period of time is the value to be taken. I think if you look at the cases it is plain that that time is not, as was contended by Mr. Manisty, the time of granting the lease, but the time of the severance of the term. That was evidently the view taken by the present Master of the Rolls in *Hartley* v. *Maddocks*. (3) Speaking of the manner in which a rent-charge ought to be apportioned where the tenant of the land

(1) Cro. Jac. 160. (2) Cro. Eliz. 771.
(3) [1899] 2 Ch. 199.

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Darling J.

on which it was charged had been evicted from part of it by title paramount, he said, "I may state that in my view the apportionment ought to be, not according to acreage, but according to the respective values of the property at the date of the eviction." Here then we think that the basis of the apportionment must be the relative values of the different portions of the land at the time when Davenport and Lockett severed the term by assigning a portion of it to Smith, namely, in November, 1881. The case must go back to the county court judge to ascertain what those values were at that date.

BUCKNILL J. I am of the same opinion. The plaintiff sues the defendant for his rent. It is admitted that the defendant is not liable for the whole rent, but only for a proportion, and the question is how that proportion is to be calculated. I agree that it must be calculated upon value and not upon yardage.

Appeal allowed.

Solicitors for defendant: *Sims & Syms.*

Solicitors for plaintiff: *Davenport, Cunliffe & Blake.*

J. F. C

GRIMSHAW, BAXTER & ELLIOTT, LIMITED *v.* PARKER.

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May 4.

County Court—Practice—Stay of Execution pending Appeal—Jurisdiction of County Court Judge—Order that a sum for Security for Costs be paid into Court—Money "affected by the judgment"—Rules of the Supreme Court, 1883, *Order* LIX., *r.* 14.

By Order LIX., r. 14, of the Rules of the Supreme Court, 1883, an appeal from an inferior Court is not to operate as a stay of proceedings unless the inferior Court so orders, or unless within ten days after the decision a deposit is made of or security given to the satisfaction of the inferior Court for a sum to be fixed by that Court, not exceeding "the amount of the money or the value of the property affected by the judgment":—

Held, that the "money affected by the judgment" includes costs, and that therefore a county court judge has jurisdiction to order a defendant against whom judgment for a sum of money and costs has been given, and who desires to appeal, to deposit in Court or give security for a sum for costs in addition to the amount for which judgment has been given as a condition precedent to the appeal operating as a stay of proceedings.

APPEAL from an order of the judge of the Clerkenwell County Court.

The plaintiffs, Messrs. Grimshaw, Baxter & Elliott, Limited, sued the defendant in the county court for 67*l.* 3*s.* for work done and materials provided for the defendant at his request, and on April 15, 1910, the county court judge gave judgment for the plaintiffs for 52*l.* 1*s.* and costs.

The defendant paid the 52*l.* 1*s.* into Court within ten days of the judgment, and on April 23, 1910, gave notice of appeal from the judgment of the county court judge.

By the Rules of the Supreme Court, 1883, Order LIX., r. 14, "The appeal" (i.e., the appeal from the county court) "shall not operate as a stay of proceedings under the decision appealed from unless the inferior Court shall so order or unless within ten days after the decision a deposit shall be made of or security given to the satisfaction of such inferior Court for a sum to be fixed by the said Court, not exceeding the amount of the money

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or the value of the property affected by the judgment order or finding appealed from."

On April 26, 1910, the defendant made an application to the county court judge for an order that proceedings should be stayed pending the appeal.

The county court judge ordered that the defendant should pay into Court or give security for a sum of 50*l.* within fourteen days from the date of the order as a condition precedent to the pending appeal from the judgment operating as a stay of proceedings, notwithstanding that the defendant had previously deposited the 52*l.* 1*s.* in Court. From that order the defendant appealed.

Ernest Todd, for the defendant. The county court judge had no jurisdiction to make the order. The "money . . . . affected by the judgment" referred to in Order LIX., r. 14, does not include the costs, but is only the 52*l.* 1*s.* recovered by the judgment, and the county court judge had no power to order any sum exceeding that amount to be brought into Court as a condition of the stay of proceedings.

H. Dobb, for the plaintiffs. The words "money . . . . affected by the judgment" include costs. The costs become due as a result of the judgment and are therefore affected by it within the meaning of the rule.

Ernest Todd in reply. If it had been intended by the rule that the costs were to be added to the amount of the judgment the costs would have been specifically mentioned. The sum fixed by the inferior Court has to be deposited in Court within ten days after the decision, and it could hardly have been within the contemplation of the framers of the rule that the costs should be taxed within ten days. If the practice which exists in the High Court of requiring the costs to be paid as a condition of a grant of a stay of execution had been intended to be applied to the county court the rule would have contained a statement to that effect. It is clear that the words "property affected by the judgment" cannot include costs, and the word "money" must have a corresponding meaning.

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BRAY J. The question which arises in this case is not an unimportant one, nor is it entirely free from difficulty, because it involves the construction of Order LIX., r. 14, of the Rules of the Supreme Court, 1883, and the language of the rule is not at first sight quite clear. What has been done is this. There was a judgment for the plaintiff with costs for 52*l.* 1*s.*, and that sum was deposited in Court within ten days by the defendant, and an application was thereupon made on his behalf under the rule for a stay of proceedings. The county court judge had to construe the latter part of the rule, and that involved his deciding whether the deposit or security which may be fixed by him extends not only to the amount of the debt, but also to the costs. The rule assumes that the county court judge will have to fix the sum. It says that a deposit shall be made or security given "for a sum to be fixed by the said Court, not exceeding the amount of the money or the value of the property affected by the judgment order or finding appealed from." Let us leave out of consideration for a moment the words "or the value of the property" and consider only those which refer to the amount of the money. The meaning of these words is not quite clear, but in my opinion the expression "the amount of the money . . . . affected by the judgment" includes not only the debt, but also the costs. The costs are affected by a judgment or order because the judgment or order relates not only to the payment of the debt, but also of the costs. Therefore the amount involved is the amount of the debt plus the costs. In construing this rule I think that we are at liberty to consider what would be the natural and reasonable practice. The practice in the High Court, when an application is made similar to that which was made to the county court judge, is to deal not only with the amount of the judgment, but also with the costs. Is there any good reason why in the county court the judge should be precluded from doing the same thing? It is possible that in an action the real question involved might be the right of one of the parties to do a certain act. The actual amount of money recovered by the judgment might be a small sum, perhaps not exceeding 40*s.*, but a large amount of costs might be involved. In that case why should the county court judge be

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limited to the amount of the judgment and not have the power to make an order for security to be given for a sum to include the amount of the costs? In my opinion the true construction of the rule is that it includes costs. On behalf of the defendant it is contended that the words "the value of the property" must be read together with the word "money," and that as "the value of the property" affected by the judgment cannot include costs, it could not have been intended that they should be included in the word "money." The words "value of the property affected" may have to be construed hereafter, but in the present case we must, in my judgment, confine ourselves to the other words of the rule, and in my opinion the expression "money affected by the judgment" includes the costs. If that be so, as in the present case the costs had not been paid into Court, nor had security been given for them when the application was made to the county court judge to stay execution, he was entitled to make it a condition of the stay being granted that not only the amount of the debt should be deposited, but that security should also be given for the costs. In my judgment, therefore, this appeal fails.

LORD COLERIDGE J. I agree. The language of Order LIX., r. 14, of the Rules of the Supreme Court, 1883, is at first sight somewhat ambiguous, but upon consideration it appears to me that the meaning of the rule is clear. It is a rule which declares that an appeal shall not ipso facto operate as a stay of proceedings. That being so, the county court judge was entitled either to order that the appeal should operate unconditionally as a stay, or he might impose any condition authorized by the rule. The rule provides that, if within ten days after the decision in the case a deposit is made of a sum not exceeding the amount of money affected by the judgment, it shall operate as a stay. What is the meaning of the words "the amount of the money"? The intervention of the Court is necessary in order that the question whether the deposit is or is not of a sufficient sum to represent the amount of the money affected by the judgment or order may be decided, because, in my opinion, the amount of the money affected by the judgment would necessarily include costs, and if the costs are not determined or settled within the ten days mentioned in the rule

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the Court must be invoked and satisfied that the deposit complies with the requirements of the rule. In such a case an application to the county court judge is involved, and it seems to me that unless he is satisfied upon the point a deposit does not operate under the rule as a stay of execution.

Appeal dismissed.

Solicitor for plaintiffs: *Julius A. White.*
Solicitor for defendant: *W. H. Court.*

J. E. A.

[IN THE COURT OF APPEAL.]

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April 5, 6, 7, 21.

THE KING *v.* THE BOARD OF EDUCATION.

Education—Public Elementary School—Teachers—Salaries—Provided and Non-provided Schools—Local Education Authority—Right to discriminate—Failure to maintain and keep efficient—Board of Education—Decision—Want of Jurisdiction—Certiorari—Mandamus—Education Act, 1902 (2 *Edw.* 7, *c.* 42), *s.* 7.

A local education authority has no power under the Education Act, 1902, to differentiate, in the matter of teachers equally qualified and teaching the same subjects, between the salaries paid in provided and non-provided schools as such.

On the coming into force of the Education Act, 1902, the local education authority of Swansea continued to pay salaries to the teachers in the schools in the district at the rates previously in existence, the salaries paid to teachers in provided schools being at a higher rate than those paid to teachers of similar qualifications in non-provided schools. Subsequently an increase was made in the salaries paid to teachers in the provided schools only, and the managers of a non-provided school in the district complained to the Board of Education that the local education authority, by refusing to pay salaries in the non-provided school at the same rate as in the provided schools, had failed to maintain and keep efficient the non-provided school, as provided by s. 7 of the Education Act, 1902. The Board appointed a barrister to hold an inquiry, and, after hearing evidence on behalf of the managers, he reported that the school had regularly earned the grant, but only through the deficiency in salaries having been made good by the managers, and that the local education authority had failed to maintain and keep efficient the school. The Board of Education decided that there had been no such failure by the local education authority, on the

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grounds that there was no statutory right on the part of the managers of any particular school to receive any particular scale of salaries, and that it had not been shewn that the money provided by the local education authority was inadequate for the purpose of maintaining and keeping efficient the school in question:—

Held, that the decision of the Board of Education must be quashed on the ground that it did not answer the question submitted to them and that a mandamus must be issued directing the Board to determine the question according to law.

Decision of the Divisional Court affirmed.

APPEAL from the decision of a Divisional Court (Lord Alverstone C.J., Darling and A. T. Lawrence JJ.) making absolute rules nisi for certiorari and mandamus against the Board of Education. (1)

The following statement of facts is taken from the judgment of the Master of the Rolls:—At the date when the Education Act, 1902, became operative in Swansea there were eight voluntary schools, of which the Oxford Street school was one, and there were a good many Board schools. The salaries paid to the teachers in Board schools were higher than those paid in voluntary schools, and (in the opinion of the Master of the Rolls) no complaint could justly be urged on the ground that no change was made in the salaries immediately after the transfer. In 1904 the local authority agreed to continue to pay the old salaries in "provided" and "non-provided" schools. There were various disputes as to the sufficiency of the Oxford Street school buildings, all of which disputes were disposed of some time ago. In April, 1907, the local authority adopted an amended scale of regulations respecting qualifications and salaries for teachers in "provided" schools. A considerable increase was made in the salaries, which were already higher than those in the "non-provided" schools, and the local authority at the same time declined to make any change in the salaries fixed in 1904 for the "non-provided" schools. This naturally gave rise to much ill-feeling. The teachers, who were required to enter into written agreements, declined to enter into such agreements except upon terms of receiving salaries on the same scale as teachers in "provided" schools, and they signed agreements

(1) [1909] 2 K. B. 1045.

with salaries on the 1907 scale inserted. On the other hand, the managers declined to sign these agreements or to make themselves responsible for the increased salaries unless the local authority would provide the money. Some of the teachers resigned; others threatened to resign, and finally they continued to hold their positions upon an arrangement made, without prejudice, that the managers should make up the difference between the old scale and the 1907 scale. On February 3, 1908, the managers of the Oxford Street school applied to the Board of Education, and they stated the issue between the managers and the local authority which the Board had to determine as follows: "(1.) That the local education authority have failed in their duty under the Education Acts, 1870, 1907. (2.) That the salaries paid to the teachers by the local education authority are inadequate. (3.) That the teachers' salaries should be those contained in the agreements made between them and the managers and that in future the school should be maintained by the local authority without any discrimination as to salaries between it and schools provided by the authority. (4.) That the sums paid to the teachers by the managers as aforesaid are expenses properly incurred by the managers for which provision should have been made by the authority and that payments should forthwith be made to the managers in respect of those expenses to the extent thereof. (5.) That the Board of Education should make such orders and grant such other relief as may be necessary to make good the default of the local education authority." On July 9, 1908, the Board of Education ordered a public inquiry to be held by Mr. J. A. Hamilton, K.C. The managers on the one side and the local education authority on the other exchanged statements of their respective cases. The matter came before Mr. Hamilton on July 31 and August 1, 1908. Evidence was called on the part of the managers in support of their case, in the forefront of which was the contention that the local authority had discriminated between teachers in the Oxford Street school and teachers in the "provided" schools in respect of emolument to the prejudice of the former, and this on grounds unconnected with any circumstances peculiar to the school of an educational character and without any difference in qualifications or conduct

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existing between the teachers in this school and in the "provided" schools in Swansea. The local authority on the other hand contended that control of expenditure involved discrimination between school and school and between teacher and teacher, and that if they saw fit the authority were entitled to discriminate between "provided" and "non-provided" schools even though their circumstances were educationally the same. No evidence was called on behalf of the local authority. No attempt was made, by cross-examination or otherwise, to shew that there was any special circumstance affecting the Oxford Street school which might justify differentiation. Mr. Hamilton reported that the Oxford Street school had regularly earned the grant and to that extent had been maintained and kept efficient, but that this had been done not by the authority but only by the combination of funds contributed by the managers, and, further, that the managers had neither played into the teachers' hands nor acted improvidently, and that it was not practicable to keep the staff together or to obtain a staff capable of keeping the school efficient unless they paid higher salaries than those which the authority fixed.

On December 17, 1908, the Board wrote a letter conveying their decision, which, omitting formal parts, is in the following terms:—"I am directed by the Board of Education to enclose a copy of the report made to the Board by Mr. J. A. Hamilton, K.C., setting forth the result of the inquiry held by him at Swansea on July 31 and August 1 last. The Board have carefully considered Mr. Hamilton's report, together with the evidence tendered before Mr. Hamilton at the inquiry, and have taken legal advice thereon. The true question at issue between the authority and the managers is one of fact, namely, whether teachers can be procured for the Oxford Street Church of England School at the scale of salaries to which the local education authority consented in their letter of April 18, 1907; if they can, it appears to the Board that the sums paid by the local education authority are adequate for the purpose of maintaining the school and keeping it efficient; if not, then the local education authority have failed in their statutory duty. The Board are of opinion that no sufficient evidence has been adduced to prove that the authority have so failed, and they see no substantial grounds for

supposing that the task of the managers in procuring teachers at the scale of salaries to which the local education authority consented in their letter of April 18, 1907, was an impossible one or that they could not have filled any such vacancies as occurred or might occur at that scale if they had determined so to do. It is suggested that the future efficiency of the school would be imperilled by the employment of teachers at the lower rate of pay, but this is a somewhat remote speculation and ought not, in the view of the Board, to prevail against the judgment of the local authority that the school can in fact be maintained in a state of efficiency on the rates of pay which they are willing to provide. There is no statutory right on the part of the managers of any particular school to receive from the authority any particular scale of salaries for their teachers. That is a matter entirely for the authority which controls the expenditure, subject only to the obligation to give such salary as will procure teachers capable of keeping the school efficient. The contention of the authority, that the only question arising here is one of control of expenditure, does not adequately indicate the whole point at issue. The crucial question is whether their proposed expenditure is adequate for the performance of their statutory obligation. As already stated, the Board do not find upon the evidence that the money provided by the authority for the salaries of the teachers has been shown to be inadequate for this purpose, and they decide accordingly that the authority have not failed in their duty to maintain and keep efficient the Oxford Street school." The managers thereupon applied for a writ of certiorari to quash the decision and for a mandamus.

The Divisional Court held that the local education authority had no power to discriminate between provided and non-provided schools as such in the matter of the salaries paid to the teachers, and they made absolute the rules for certiorari and mandamus upon the ground that the Board had not decided the true question submitted to them.

The Board of Education appealed.

Sir W. S. Robson, *A.-G.*, *Sir Rufus Isaacs*, *S.-G.*, and *Rowlatt*, for the appellants, the Board of Education. If the decision of

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the Divisional Court is maintained the local authorities will be bound to increase the rate of teachers' salaries in all non-provided schools to that paid in provided schools in their district, though the circumstances may be different in each case. That would throw a very heavy burden on the authorities which was never intended or justified by the Act.

The only question before this Court is whether the Board of Education have refused to decide the question submitted to them. The only question submitted to them was whether the local authority have "maintained and kept efficient" this school according to the words of the Education Act, 1902, s. 7, sub-s. 1.

Of that question s. 7, sub-s. 3, of the Act makes the Board of Education the sole judge. The words are "If any question arises under this section between the local education authority and the managers of a school not provided by that authority, that question shall be determined by the Board of Education." They are the skilled authority appointed by the Act, and there is no appeal from their decision. They are not bound by the report made by Mr. Hamilton, K.C., or by a report made to them by one of their own inspectors, because they cannot delegate the authority given to them by the Act. They were not in fact bound to take any evidence at all. Apart from any question of the construction of the Act which appointed them, which would, of course, be for the Court, the Board are the sole judges of fact and of law. An action by the managers against the local authority would not lie. The question of the difference in salaries is only an element. Efficiency and expenditure have no exact co-relation. The duty of the local authority is to provide for such an expenditure as is reasonably necessary to maintain the school in a state of efficiency: *Attorney-General* v. *West Riding of Yorkshire County Council.* (1) This school has been kept in a state of efficiency; it has always earned the Government grant. Whether the local authority has discriminated between the salaries or not is wholly immaterial. The appellants do not contend that the local education authority has any power to discriminate between provided and non-provided schools as such, but the local conditions may be such that it may be

(1) [1907] A. C. 29, at p. 32.

possible to procure equally efficient teachers in a non-provided school at a less cost than at a provided school, and in that case it is impossible to say that the local authority has failed in its duty in paying the smaller sum.

[COZENS-HARDY M.R. referred to *Wilford* v. *West Riding of Yorkshire County Council.* (1)]

In that case the ground of decision was that the points before the Court were not within those referred by the Act to the Board, i.e., that s. 7, sub-s. 3, did not apply. There is no question of its applying here, for the King's Bench Division have issued a mandamus to the Board to do their duty under it. The appellants contend that they have already done it. They have decided that the salaries offered by the local authority are sufficient to maintain the efficiency of this particular school. It was the duty of the local authority to pay the lowest salaries compatible with efficiency. The Board had not before it any question of different rules for non-provided schools in general, but only whether the salaries offered were sufficient in this particular case. Of that question the Board were the sole judges. They have examined it and decided it, and this Court cannot interfere with their decision.

Sir R. Finlay, K.C., C. A. Russell, K.C., Aubrey Lawrence, and *Reginald Hills,* for the respondents, the managers of the non-provided school. The one question upon which the parties were at issue was whether the education authority were entitled to discriminate between provided and non-provided schools as such. The inevitable result of holding that they are must be that the non-provided schools would ultimately stand at a lower level of efficiency than the provided schools. Nothing is to be made of the fact that the old standard was observed. The very object of the Education Act was to put the two classes of schools on the same level of efficiency. The Board could not have decided in terms that the educational authority could discriminate between provided and non-provided schools as such, and therefore they substituted another question. When the decision of the Board is looked at by the side of Mr. Hamilton's report it is obvious that the Board altered the question they had to

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decide and gave the go-by to the question submitted to them. Admittedly there are no special circumstances to justify discrimination. The Board purport to decide on the evidence, but admittedly there is no evidence upon which they could have decided as they did. Either their decision is perverse or they have taken a wrong view of the law. Neither the local authority nor the Board have any right to disregard the terms of the Act, and if they do the Court has jurisdiction to interfere.

The Solicitor-General in reply.

Cur. adv. vult.

April 21. COZENS-HARDY M.R. These appeals raise important questions as to the powers and duties of a local education authority in regard to non-provided schools, and also as to the power of the Court to deal with a question which has been decided by the Board of Education. Logically the second question ought to be discussed first; but as I am clearly of opinion, for reasons which I propose hereafter to state, that there is jurisdiction in the present case, I think it will be convenient to consider in the first place the general provisions of the Education Act of 1902, without reference to the particular facts of the present case.

Now the Act of 1902 effected a revolution. Prior to that Act there were school board schools and what were called "voluntary schools," the former supported out of rates and Government grants, the latter supported out of voluntary subscriptions and Government grants. The Act abolished school boards and imposed upon local education authorities the obligation of maintaining and keeping efficient all schools within the area of the authority, whether they were "school board" schools, called "provided" schools, or "voluntary" schools, called "non-provided" schools, the necessary expenditure in each case being thrown upon the local authority. Sect. 7 of the Act makes this clear. In the "non-provided" schools certain conditions have to be complied with, but subject to those conditions "provided" and "non-provided" schools are alike entitled to the benefit of the Act. The appointment of teachers in "non-provided" schools rests with the managers, although the control of the expenditure rests with the local education authority. Now I

think it is plain, according to the true construction of the Act, that the local authority is bound to treat "non-provided" and "provided" schools on the same footing and not to discriminate in matter of efficiency between "provided" schools on the one hand and "non-provided" schools on the other *as such*, or, in other words, that there must not be one standard of efficiency for "provided" schools and another standard for "non-provided" schools *as such*. The Lord Chief Justice said in his judgment: "It appears to be beyond all question that the Legislature intended that, from the point of view of the teachers, their salaries, and their qualifications, provided and non-provided schools were to be treated alike, and that there is not the slightest justification for any claim by a local education authority to differentiate between the scale of salaries allowed to the same class of teachers in provided as compared with the non-provided schools. . . . . A local education authority has no power under the Act of 1902 to differentiate in the matter of teachers equally qualified and teaching the same subjects between the salaries paid in provided and non-provided schools as such." These passages seem to me to express with perfect accuracy the real meaning and effect of the Act of 1902. In saying this, I do not indicate any doubt that it is competent to a local authority in the case of any particular school, whether "provided" or "non-provided," to consider that there are special circumstances affecting that particular school such as to justify different treatment in the matter of salaries or otherwise; but I repeat it is not competent to a local education authority which does not like "non-provided" schools to treat them differently from "provided" schools, in the matter of staffing or otherwise, merely on the ground that they are "non-provided" schools. A policy of starving "non-provided" schools cannot be justified on the ground that the starvation has not been carried so far as to produce extinction or to prevent the earning of a Government grant. Whatever treatment is applied in the case of "provided" schools *as such* must be applied in the case of "non-provided" schools *as such*.

It is manifest that questions of detail must arise between the managers and the local authorities throughout the country, and sub-s. 3 of s. 7 contains this provision: "If any question

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arises under this section between the local education authority and the managers of a school not provided by the authority that question shall be determined by the Board of Education." In my opinion that section deals with any question of fact arising under s. 7 and is not limited to a question arising as to the compliance with the conditions and provisions under heads *a*, *b*, *c*, *d*, and *e*. I think, however, there is nothing in that section which enables the Board of Education to decide an abstract question of law, or anything else than a question of fact, although the question of fact may involve the consideration of the true meaning and effect of the Act of Parliament itself. It does not enable the Board of Education to legislate, and if its decision is based upon a wrong interpretation of the statute, I think it is not absolute in the sense that no Court can interfere with or review it. In all matters of fact not involving a wrong construction of the statute the decision of the Board of Education will be final. If, however, as in the case of *Wilford* v. *West Riding of Yorkshire County Council* (1), the Board of Education gives a decision which proceeds upon a wrong interpretation of the statute, such as the meaning of the word "maintain," the decision is not conclusive, and it is competent to the Court in an action, notwithstanding the decision of the Board of Education, to do what is right between the parties. I agree with Channell J.'s judgment in *Wilford's Case* (1) on this point. Moreover sub-s. 3 only deals with the authority on the one hand and the managers on the other. It does not prevent the Attorney-General, on behalf of the public, from applying to a Court of law on the ground that the statutory obligations imposed by s. 7 have not been complied with, and I incline to the view, though it is not necessary to express a decided opinion, that an aggrieved parent or ratepayer might likewise apply to the Court. In the above observations I am not considering whether a writ of certiorari, which is a special remedy, could be granted on the mere ground of error in law. [The Master of the Rolls stated the facts of the case, and continued:—]

The Divisional Court held that a writ of certiorari ought to issue on the ground that the question submitted to the

(1) [1908] 1 K. B. 685.

Board had not been answered. On this simple ground I am clearly of opinion that the decision of the Divisional Court was correct. The question was formulated in paragraphs 3 and 4 of the letter of February 3, 1908. It was not whether the Oxford Street school was efficient, in the sense of being able to earn a Government grant, but whether there were any circumstances existing in the case of the Oxford Street school such as to justify a different treatment from that accorded to the "provided" schools of the same character. There is nothing in the Board's decision to indicate that the right to discriminate, about which the whole battle raged, had ever been challenged. Still less is there anything to indicate the view of the Board as to the existence of such a right. It is not alleged that the Board had any materials before them, except Mr. Hamilton's report and the evidence on the inquiry, and there is not a scintilla of evidence to justify the statements in the letter conveying the decision of the Board. It was argued that the Board were entitled to act upon their general knowledge. They do not purport to do so, and I repudiate the suggestion that they could thus wholly disregard and throw aside the materials which they had themselves procured and to which alone they refer.

I have carefully considered the terms of the Board's decision. I regret to say that I can only account for it upon the theory that the Board took the view, which their counsel now admit to be wrong, that the local authority might discriminate between "provided" and "non-provided" schools *as such*, and that it was sufficient if the school was so maintained as to earn the Government grant. If this be the explanation I can understand the decision, although it did not answer the question put. On any other view it seems to me the decision was so perverse as really to amount to a non-exercise of the jurisdiction entrusted to the Board. I think, therefore, that the decision cannot stand, that it must be quashed, and that a mandamus must be issued directing the Board to determine the question according to law. The appeals must be dismissed with costs.

FARWELL L.J. I agree that these appeals should be dismissed, and I do not propose to recapitulate the facts. It is sufficient to

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state that ever since 1904 or 1905 the Swansea local education authority has persistently asserted its right to prefer provided schools to non-provided, and has refused to pay salaries to the teachers in the latter of the same amount as those paid to teachers in the former, solely and entirely on the ground that the latter are Church schools. It is quite clear, and is now conceded by both the Attorney-General and the Solicitor-General, that this is a contravention of the Act, which requires the local education authorities throughout the kingdom to maintain and keep efficient all public elementary schools, and has entrusted them with powers of raising money for the purpose; all the ratepayers contribute and all are entitled to have the money applied, according to the Act, fairly and equally, without preference or priority by reason of creed in any way. It is satisfactory to find it proved in this case that the Swansea local education authority and one other have alone proved themselves unworthy of this trust reposed in them by the Legislature. Mr. Hamilton finds (p. 8, s. 14): "The local education authorities throughout the country pay teachers on a regular scale and, except in the boroughs of Halifax and Swansea, they do not discriminate between teachers in provided and teachers in non-provided schools as such." There may, of course, be circumstances which would make it proper to discriminate between different schools, whether provided or non-provided, apart from the fact that the provided are not and the non-provided are Church schools; but it is for the person alleging the existence of such facts to prove them: in the absence of evidence there is no ground for making higher payments to one class of school as such than to another. The Board of Education in 1908 appointed Mr. Hamilton to hold an inquiry under s. 16 of the Act of 1902 into the allegation that the Swansea authorities had failed to fulfil their duty under the Act with respect to the staff of the non-provided school, and the Swansea authority, by their preliminary statement and by their counsel, contended that they were entitled to prefer the provided to the non-provided schools; they also alleged in their statement that there were special circumstances; but they offered no evidence in support of these allegations, notwithstanding that their

attention had been directed to the importance of special circumstances by the letter of the Board of July 31, 1906. The subject-matter of the inquiry may be stated thus: Is it true that the Swansea authority refuses to provide salaries on the same scale for the non-provided as for the provided school? If so, is there any and what ground for such refusal? It is quite plain from the preliminary facts and disputes that this is the substance of the question that the Board of Education was requested to answer, and I entirely dissent from the Attorney-General's contention that they were entitled to turn the question put to them into another question so as to evade the real point. Both parties agree that a question as to the sufficiency of the sum found by the local authority and paid to the managers may be a question for the Board under s. 7, sub-s. 3, and it is therefore unnecessary to consider whether it is so or not; but the question that the Board have chosen to answer is not that asked, but is a hypothetical question, irrelevant to the point in issue. The Board knew that the Swansea authority was contending that they had the right to prefer; they knew that the non-provided schools had received smaller sums than the provided schools for their teachers; they knew that the difference between the salaries of the teachers in the non-provided and provided schools had been made up by voluntary subscriptions; they had Mr. Hamilton's conclusion in paragraph 16 before them, and they pass by all these material facts and say that the real question is the hypothetical question whether the managers could have got as good teachers for the lower salaries. In order to arrive at this they must either have erroneously concluded that in law the Swansea authority had the right to prefer claimed by them, or they must have deliberately evaded the only answer open to them on the evidence, namely, that there was no ground, by replying that although the Swansea authority had no such right to prefer, yet, if they had, they could have got other competent teachers—a hypothesis unsupported by any evidence and quite irrelevant. I cannot believe that a public department such as the Education Office can have been guilty of a course which could only be characterized as flagrant misconduct, and I prefer to think that they mistook the law; and this

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is borne out to some extent by the penultimate clause in their letter, in which they say that the matter of the salaries is one *entirely* for the local authority. I read this as meaning that the authority had the right to prefer the provided to the non-provided schools without any reason whatever beyond the fact that one set was provided and the other non-provided.

There is no sort of question on the evidence that the Swansea authority have not maintained and kept efficient the non-provided schools; such schools have been maintained and kept efficient partly by the authority and partly by voluntary subscriptions; the statement of the Board as to want of evidence to shew the impossibility of obtaining adequate teachers at the lower salaries shews a clear mistake in law; it was not for the managers to prove the negative; it was for the Swansea authority to prove the affirmative, and, although their attention had been pointedly called to this, they made no attempt to give evidence of it. It would be simply monstrous in the face of this to disregard the positive evidence given before Mr. Hamilton, and his findings. It is due to the Board to say that they do not put forward the contention of the Attorney-General that they were entitled to act without evidence, and in the teeth of the evidence, as they pleased; they profess to act on the evidence adduced before Mr. Hamilton, and on that only; and rightly so, for I entirely dissent from the Attorney-General's argument. The Board under s. 7, sub-s. 3, act in a judicial capacity and are bound to obey the law and act according to the ordinary rules of evidence; they can neither dispense with the requirements of the Act nor assume knowledge of particular facts not proved before them. I do not mean that they must have evidence on oath, but they must have statements which they are entitled to and do believe.

Then it was contended that, even if this be so, this Court has no jurisdiction to interfere—the Attorney-General went so far as to say on any ground or in any way whatever. The Solicitor-General qualified the generality of this contention by saying "unless they have wrongfully given themselves or assumed a jurisdiction that they did not possess." The Solicitor-General's contention is, in my opinion, the more accurate, but it requires explanation and expansion. The point is of very great importance

in these latter days, when so many Acts of Parliament refer questions of great public importance to some Government department. Such department when so entrusted becomes a tribunal charged with the performance of a public duty, and as such amenable to the jurisdiction of the High Court, within the limits now well established by law. If the tribunal has exercised the discretion entrusted to it bona fide, not influenced by extraneous or irrelevant considerations, and not arbitrarily or illegally, the Courts cannot interfere; they are not a Court of Appeal from the tribunal, but they have power to prevent the intentional usurpation or mistaken assumption of a jurisdiction beyond that given to the tribunal by law, and also the refusal of their true jurisdiction by the adoption of extraneous considerations in arriving at their conclusion or deciding a point other than that brought before them, in which cases the Courts have regarded them as declining jurisdiction. Such tribunal is not an autocrat free to act as it pleases, but is an inferior tribunal subject to the jurisdiction which the Court of King's Bench for centuries, and the High Court since the Judicature Acts, has exercised over such tribunals. In this case the Board, by acting on a wrong construction of the Act, have not exercised the real discretion given to them thereby; a discretion to say whether the sums provided are fit and proper on the assumption that the Act allows the authority to prefer provided to non-provided schools as such is entirely different from a discretion to say whether they are fit and proper when such preference is unlawful; wholly different considerations arise, and that which may be plain on one assumption in one way may be equally plain on the contrary assumption in another way. This is in accordance with the decision of this Court in *Reg.* v. *Vestry of St. Pancras.* (1) In that case the head-note is: "A metropolitan vestry has a discretion under 29 & 30 Vict. c. 31, s. 1, not merely as to granting or refusing a superannuation allowance to a retiring officer, but also, if an allowance be granted, as to the amount, subject to the scale of maximum allowances prescribed in s. 4." It had been held in the Queen's Bench Division in *Reg.* v. *St. George's, Southwark* (2), that there was no discretion under the Act as to the

(1) (1890) 24 Q. B. D. 371. (2) (1887) 19 Q. B. D. 533.

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amount to be granted. The vestry declined to grant a superannuation allowance at all, because they thought they had no discretion as to the amount, and they thought the amount was too large, and therefore gave none at all. That was set aside by the Divisional Court, consisting of Lord Coleridge C.J. and Mathew J., and also by the Court of Appeal, Lord Esher and Fry L.J. In giving judgment Lord Esher says this (1): "They must fairly consider the application and exercise their discretion on it fairly, and not take into account any reason for their discretion which is not a legal one. If people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion." Then Fry L.J. says (2): "The second reason is that the meeting when it came together acted naturally under the bias of the decision in the case of *Reg.* v. *Vestry of St. George's, Southwark* (3), and if that case is right of course its influence on their minds was legitimate. If the case is wrong then they have without any fault on their own part exercised a discretion under a mistaken view of the law"; and they accordingly set it aside.

Further, they have by answering a question not put to them, and avoiding any answer to the real question, declined jurisdiction: see the judgment of Cockburn C.J. in *Reg.* v. *Adamson*. (4) In that case under 11 & 12 Vict. c. 42, s. 9, justices were to issue a summons "if they shall think fit." Application was made to justices on a written statement of several witnesses present in Court and ready to be sworn. The magistrates heard the statements and refused the summons without giving any reasons. Cockburn C.J. (5) says this: "If I could see my way to the conclusion that the magistrates had considered this evidence and given a decision upon it, I should certainly say that the Court could not act upon the matter further, or send the case back to the magistrates; but the Solicitor-General has called our attention to evidence of such a description that I cannot

(1) 24 Q. B. D. at p. 375.
(2) 24 Q. B. D. at p. 378.
(3) 19 Q. B. D. 533.
(4) (1875) 1 Q. B. D. 201.
(5) 1 Q. B. D. at p. 205.

resist the conclusion that the magistrates must have acted upon a consideration of something extraneous and extra-judicial which ought not to have affected their decision, and which, it seems to me, was the same as declining jurisdiction." Then a little lower down he says: "I think it very probable that they thought that they were doing what was right, and that they were influenced by their distaste for the views and doctrines promulgated at the meeting, and thought that the sooner the matter was buried in oblivion the better. But these were considerations which ought not to have influenced them at all, and under the circumstances I think they must be taken to have declined jurisdiction." Blackburn J. comes to the same conclusion, although with some little doubt, saying, "I think that when they think the charge frivolous or vexatious they are not bound to grant an application for summonses. But here there is reason for saying that they proceeded on some ground which they ought not to have considered." Field J. concurred. I apply that to the present case and say that, if the Board did know the law to be as it is now admitted to be, they must have acted upon a consideration of something extraneous and extra-judicial which ought not to have affected their decision, and this was suggested by the Attorney-General when he said that the Board were in a difficulty and that questions of policy were involved. If this means that the Board were hampered by political considerations, I can only say that such considerations are pre-eminently extraneous, and that no political consequence can justify the Board in allowing their judgment and discretion to be influenced thereby. Further, if the Board did not proceed on a mistaken assumption of the law, but deliberately disregarded it either on the question of the construction of the Act or on the entire want of evidence, then I should be of opinion that they had been guilty of misconduct so flagrant as to make it impossible for their decision to stand. The Board cannot disregard and proceed in defiance of facts: suppose the facts to be that the authority paid nothing, but that the non-provided schools were supported by voluntary subscriptions only, a finding by the Board that the authority maintained and kept efficient the schools would be perverse to such an extent that the Court would infer that they must have been

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influenced by extraneous and therefore improper considerations, and had not, in fact, exercised their discretion. In the present case the mere fact that the Board have not answered the question put, or any reasonable equivalent of it, but have stated a new and irrelevant question of their own, is sufficient to shew that they have not exercised the discretion given them. I have come to the conclusion that the decision of the Board must be set aside, and that the mandamus must go against them, on the assumption that the question arises under s. 7, sub-s. 1 (*a*), (*b*), (*c*), or (*d*), as has been asserted by all parties throughout, and also on the ground that the real question is one of fact. I agree with Channell J. in *Wilford* v. *West Riding of Yorkshire County Council* (1) that sub-s. 3 of s. 7 is confined to questions arising on fact. The Act has created two bodies who may come into conflict with one another; if and so far as such conflict may arise out of details of administration, involving matters of accounts, reasonable conduct, and similar facts, the Board are to decide between them; but apart from and above all minor questions of detail between local authority and managers there are the general questions of the interest of the public at large in the education of all the children of the nation, and of the particular interests of ratepayers and parents in each district that their rates should be applied and their children properly and efficiently educated in accordance with the Act. These are not questions which are referred to or can be determined by the Board as arising merely between local authority and managers: it cannot have been intended that the Board can be asked and can answer so as to bind either authority or managers such a question as whether upon the true construction of the Act the authority may prefer provided schools. Such a question is one of general importance and can be raised before the Courts by the Attorney-General or by any ratepayer or parent having a special interest therein: it cannot be that the Board can come to one decision binding the managers, and the Courts to another binding the authority, whereby the authority would be bound to pay, but the managers could not demand payment of, the difference in the amounts of salaries in the two schools. The true view, in my opinion, is

(1) [1908] 1 K. B. 685.

that the Board cannot under sub-s. 3 decide any question of law, and it follows that the managers as well as the Attorney-General and any such ratepayer and parent as above mentioned can take legal proceedings against a local authority for breach of the statutory duty to maintain and keep efficient all public elementary schools; but this does not, of course, in any way relieve the Board from their duty to enforce compliance with the Act in a case like the present, where the facts are clear; the primary duty of enforcing the Act is cast on the Board, and they cannot evade it by saying that other persons can sue if they please. The power given to the managers to apply to the Board is for their protection and assistance, but the managers are only in the position of trustees or agents for the public and the ratepayers and parents of their district; they have no personal interest as managers, except in so far as they are interested in doing their duty; it could not be suggested that if both authority and managers took a wrong view of their duties, and did not apply under s. 7, sub-s. 3, the public the parents and the ratepayers had no remedy. It would be wrong, in my opinion, to construe the Act so as to create a state of things in which a statutory tribunal might decide legal questions wrongly while the Courts of law are left free to decide them aright, and when such questions are of general public importance, but are decided by the Board as between two bodies appointed to perform public duties but having no personal interest in the matters in dispute.

I am of opinion that these appeals fail and should be dismissed with costs.

BUCKLEY L.J. Within the district of the local education authority of Swansea are certain provided schools and certain non-provided schools, including amongst the latter the Oxford Street Church of England School. It is with reference to this school that the question in this case arises. In all respects material to the question for decision the Oxford Street school is comparable with and similar to and for all material purposes identical in character with the provided schools within the district. It differs only in the fact that it is a non-provided

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school. From the time, however, when the authority took over the schools within the district with the duties imposed by the Education Act of 1902 down to the present time they have discriminated between the Oxford Street school and the provided schools in the scale of salaries paid to the teachers. To the teachers in the Oxford Street school they have continued to pay salaries at the rates which before 1902 prevailed in that school. In the provided schools they have always paid salaries on a higher scale, and in 1907 they increased that scale by raising the salaries. They have deliberately and after application by the Oxford Street school refused to treat that scale as applicable in the Oxford Street school. Down to the year 1907 the managers of the Oxford Street school were able notwithstanding this discrepancy to hold their staff of teachers together, probably in the hope that the most proper representations of the managers to the local education authority would prevail, but in 1907 several teachers resigned, and the managers say, and upon the facts as elicited in the inquiry say with truth, that they could hold their staff no longer unless they paid, and in point of fact they did pay by way of supplement to the salaries which the authority were providing, such additional sums as were necessary to bring the salaries up to the scale which prevailed in the provided schools. The Oxford Street school was kept efficient—no question is raised as to its efficiency—but that efficiency was secured not by the salaries provided by the authority, but by the combined effect of the action of the authority and that of the managers supplementing that action. In this state of facts a question was raised for determination by the Board of Education under s. 7, sub-s. 3, of the Education Act, 1902. The Board directed a public inquiry, and it resulted in the very clear report of Mr. Hamilton and the plain conclusions of fact which that document contains. The Board did not adopt Mr. Hamilton's conclusions. The question for us is whether the decision of the Board can be maintained.

Upon the construction and effect of s. 7 of the Act of 1902 questions arise and have been discussed which are far from easy. The statutory duty to maintain and keep efficient which is imposed by the first words of s. 7 is one which can, of course, be enforced by mandamus at the instance of those who are interested

in its performance. Is the effect of sub-s. 3 that the managers are precluded from applying to the Court for a mandamus and are remitted to sub-s. 3 as the only tribunal to which they can apply? Are the words "shall be determined" in sub-s. 3 words which preclude the authority and the managers from resorting to any tribunal other than the Board of Education, or are they words which do no more than create a duty in the Board if the parties resort to them? This is one question. Again the question whether a school has been maintained and kept efficient is not one in which the authority and the managers alone are interested. The public, the ratepayers, the scholars and their parents, are also interested. Is this such a question as is within sub-s. 3? If it is, then if the former question be answered in one way it results that it is for the Court to determine the question if it be raised by the public, but for the Board of Education to determine it if it be raised by the authority or the managers. Does sub-s. 3 extend to any questions other than questions which arise only as between the authority and the managers, *e.g.*, the question whether the conditions have been satisfied which make the authority responsible for the non-provided school? In the view which I take of this case it is not necessary to determine these questions, having regard to the manner in which the point before us arises for decision. The parties named in sub-s. 3 have in fact resorted to the Board of Education, and, if the question referred to the Board is one which in the limited meaning which may be attached to the word "question" in sub-s. 3 could be so referred, the only point for decision is whether the Board have rightly dealt with that question, and, if not, whether they ought to be ordered now to consider and determine it. Under these circumstances the first step is to ascertain and define exactly what is the question that was raised for the determination of the Board. Mr. Eden, the correspondent of the Oxford Street school, by a letter dated February 3, 1908, defines the question thus: "(2.) Whether the salaries inserted in the teachers' present agreements are reasonable in amount, and ought to be paid by the authority, or what salaries the authority ought to pay." "The salaries inserted in the teachers' present agreements" were salaries at the higher rate which prevailed in

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the provided schools. The question thus raised, therefore, was whether the salaries which prevailed in the provided schools were reasonable in amount and ought to be paid by the authority in the Oxford Street school, or what salaries the authority ought to pay in that school. The questions were, therefore, two—first, whether the salaries which prevailed in the provided school were reasonable, and, secondly, whether salaries at that rate ought to paid in the non-provided school. Upon the former of these no difference has arisen between the parties. No one says that the salaries at the provided schools are other than reasonable. The second, therefore, is the only question, namely, whether salaries at that rate ought to be paid at the Oxford Street school. On July 9, 1908, the Board of Education directed a public inquiry, and the language they adopted was that the object of the inquiry was to satisfy the Board whether the local education authority had failed to fulfil their duty with respect to the staff of the school. In the facts which I have stated that language obviously meant that the object of the inquiry was to ascertain whether the authority had failed to fulfil their duty by paying to the teachers in the Oxford Street school salaries at a rate less than that which prevailed in the provided schools. In accordance with directions given on the same July 9, 1908, by the Board of Education, the managers lodged a statement and the authority lodged a counter-statement for the purpose of defining their respective contentions. The short substance of those statements is that the managers alleged that the authority was discriminating contrary to the Act between schools provided and schools not provided by the authority, and were paying to teachers in the Oxford Street school salaries below the market rate, being less than the scale adopted by the authority for similar teachers rendering similar services in the provided schools, and that the authority contended that they were entitled to discriminate, that the provided schools formed a homogeneous group of schools managed in all respects in accordance with their wishes, and so on, whereas the teachers in the Oxford Street school were not their servants, but the servants of the managers. They nowhere alleged that as between the Oxford Street school and the provided schools there existed any difference of circumstances from which it resulted that

a teacher of the same capacity and experience could be obtained for the Oxford Street school at a less salary than it was necessary to pay in the provided school, unless it was to be found in the allegation that the salaries paid in the Oxford Street school were adequate, and that it was possible to obtain the services of duly qualified teachers at those salaries. If by this expression was meant that owing to circumstances peculiar to the Oxford Street school it was possible to obtain there a teacher at a lower salary than would attract a similar teacher at a provided school, there arose, as it seems to me, a question of fact upon which resort might properly be made to the Board under s. 7, sub-s. 3. But if the language was not intended to be so qualified, but meant that at those lower salaries duly qualified teachers could be obtained at either class of school, then it would have resulted that the scale of salaries paid at the provided schools was unduly high. This might, of course, have been the fact, and the case of the authority might have been that experience had led them to know that that was the fact. This again would have been question of fact. The result is that there might have been questions of fact to be determined.

The above being the materials from which the exact question raised is to be ascertained, the question to be determined between the parties may, I think, be accurately stated thus: Having regard to the fact that in order to ensure efficiency at the provided school the authority paid salaries at a certain scale, did there exist any, and what, ground for refusing to apply that scale to the non-provided school? The contention of the authority upon this question might have assumed various forms. They might have said, first, "We are not bound to observe the same standard of efficiency at the non-provided school and at the provided school. For the former such efficiency as will just earn the grant is enough; at the latter we have a higher ambition, and that is not merely to earn the grant, but to make our schools most useful to our scholars." Secondly, they might have said, "We are not bound to pay the same scale at the non-provided school as we pay at the provided school: we can differentiate: we like to be generous at the provided school and to pay handsome salaries there.

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At the non-provided we choose to pay the lowest salary we can: the one is a non-provided and the other a provided school. That is a point of difference, and it is for us to determine what we shall pay at each of the two." Or, thirdly, they might have said, "We have found by experience that the scale we adopted at the provided school is in fact too generous: we are going to abandon it there, and we are not going to apply it here." Or, fourthly, they might have said, "We do not set up any of the above contentions. Our contention is that the non-provided school offers to teachers certain attractions not measured by money, and that a lower salary there attracts just as good a teacher as a higher salary at a provided school."

As to the first of these, the contention, if raised, would plainly have been wrong. A non-provided school if and so long as it complies with the conditions and provisions contained in the Act is for the purposes of the Act a school. All public elementary schools are treated by the Act alike as regards the duty cast upon the authority to maintain them and keep them efficient. The obligation under s. 7 is an obligation in the local education authority to maintain and keep efficient all public elementary schools. This provision applies to all alike, be they provided or non-provided (assuming as regards the latter that the conditions and provisions of the Act are complied with), and the obligation is to maintain one and the same standard of maintenance and efficiency in them all. Furthermore, whether right or wrong, the question is one of construction of the Act of Parliament. In order to perform their duties under the Act the Board of Education must, of course form an opinion as to what is the construction of the Act, but they cannot determine its construction. That is for a Court of law. If the construction which they adopt be not the right construction their determination under sub-s. 3 binds no one. I need, however, say no more about this first contention. If the authority set it up, which I think they did originally, it was plainly abandoned in the King's Bench Division and in this Court. As to the second contention, it seems to me, upon reading the counter-statement put in by the authority, that this was a contention which they put forward, and not only did they put

it forward but I think they urged it in the King's Bench Division. It was a contention, I think, wholly erroneous, but so plainly was it put forward in the King's Bench Division that the judgments of the learned judges in that Court are principally directed to holding the contention to be untenable. The Lord Chief Justice says: "We hold that a local education authority have no power under the Act of 1902 to differentiate in the matter of teachers equally qualified and teaching the same subjects between the salaries paid in provided and non-provided schools as such." In that sentence is contained the substance of the judgment in the King's Bench Division. I entirely agree. There is no right in the authority to differentiate between provided and non-provided schools as such. If this had been the point decided by the Board of Education I should have been of opinion that their decision was a decision of a question upon the construction of the Act and bound no one, and, further, that it was wrong. But again as to this I need not consider it further for two reasons—first, that it is not, I think, what the Board affected to decide, and, secondly, that before us the contention has been abandoned at the Bar. As to the third contention, it was never advanced by the authority, and had it been advanced it would have been in their mouth obviously impossible. The scale at the provided school, higher originally than that at the non-provided school, was not found unduly generous, but on the contrary (if the authority were doing their duty) was found to be too low, with the result that in April, 1907, they raised it. There remains the fourth contention, and upon this, if the authority really intend to put it forward, there is, as it seems to me, a question of fact which, having regard to the circumstances that the parties resorted to the Board of Education to determine their differences, would, if advanced, be a proper question for the Board to consider. I have a difficulty in believing that the authority can really intend to advance this contention, and upon the facts as appearing by the evidence upon the inquiry I can have no doubt as to how it ought to be answered.

I must next go on to see what the Board did consider. There is not to be found in their decision a trace of any of the following facts, namely, (1.) the fact that the scale in the provided school

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was originally higher than that in the non-provided school, that it was raised, and that the provided and the non-provided school differ in no respect except in the fact that the one is provided and the other non-provided, or (2.) that the continuing efficiency of the Oxford Street school, which their decision truly affirms, is due not to the action of the authority alone, but to the combined action of the authority and of the managers. The Board ignored the first set of facts altogether and started, as it seems to me, with the assumption, erroneous in point of law, that the fact that the scale in the provided school was higher was irrelevant. They say nothing at all about it. Further they started, I think, with the assumption, erroneous in point of law, that the authority could discriminate between provided and non-provided schools as such. It is entirely for the authority, they say, to determine the scale, obviously referring to comparison with some other scale which it is in their view not their duty to apply. They investigated only whether the efficiency of the school was suffering from inadequate salaries. No one said that it was. But there was absolutely no evidence to lead them to the conclusion that the staff could have been held together and the efficiency maintained if the managers had not supplemented the salaries as they did. They ought to have started with the fact that cæteris paribus the scale ought to be the same in provided and non-provided schools alike, that the authority had themselves decided that the higher scale was the proper one to secure efficient persons, and that, in the absence of circumstances to shew that the same quality of teacher could for reasons personal to the Oxford Street school be obtained for service in that school at a lower remuneration, the scale ought to be the same. Their decision is recorded in the words that the authority have not failed in their duty to maintain and keep efficient the Oxford Street school. Except upon the erroneous assumptions which I have stated, it was impossible, upon the materials to which they refer as being those upon which their decision was founded, for the Board of Education honestly and reasonably to arrive at that conclusion. Their decision, I think, cannot be maintained. The order upon the certiorari is right.

Then as to the mandamus. The appellants' counsel, and more

particularly the Attorney-General, argued that the decision under appeal involved that the same scale of salaries must be adopted in the case of each and every school. In my opinion it involves nothing of the kind.

If under circumstances affecting any particular school a teacher of the same experience and ability can by reason of other attractions in the school be obtained at a remuneration less than that which has to be paid to secure his services at another school, there is in the decision under appeal nothing to affirm that the authority may not take such circumstances into account. I am unable to find that the Board of Education ever addressed their mind to or answered the question whether such circumstances existed. If the question of fact were for our decision, I have no hesitation in saying that there were not proved before them any facts justifying a discrimination between the provided and the non-provided schools on the ground of any circumstances peculiar to the case. The question of fact, however, is not for our decision, having regard to the circumstances in which this case comes before the Court.

The order upon the mandamus, in my judgment, is right for this reason, not that it is competent to the Board of Education to determine the question of law whether discrimination can be made between provided and non-provided schools as such, but because the parties can possibly be treated as having invited a determination by the Board of the question of fact whether circumstances exist from which it results that in the case of this particular school (say by reason of attractions which induced teachers to accept salaries at a less rate than they would be content to take elsewhere) there are grounds valid in law for applying to the Oxford Street school a scale less than that which prevails at the provided schools. The orders under appeal I think are right. These appeals must be dismissed with costs.

Appeals dismissed.

Solicitor for appellants: *Solicitor to the Treasury.*

Solicitors for respondents: *Crawley, Arnold & Co., for Strick, Bellingham & Hanson, Swansea.*

H. B. H.

1910
April 18, 19.

THE KING *v.* WEST RIDING OF YORKSHIRE JUSTICES. *Ex parte* BROADBENT.

Education — Schools — Non-compliance with Attendance Order — Reasonable Excuse — Provision of efficient Elementary Instruction — Elementary Education Act, 1870 (33 & 34 *Vict. c.* 75), *s.* 74—*Elementary Education Act*, 1876 (39 & 40 *Vict. c.* 79), *ss.* 11, 12, 48.

Sect. 11 of the Elementary Education Act, 1876, provides that, if a parent of a child above the age of five years who is under the Act prohibited from being taken into full time employment habitually and "without reasonable excuse" neglects to provide efficient elementary instruction for the child, a Court of summary jurisdiction may make an attendance order (i.e., an order that the child attend a certified efficient school). The section further provides that "any of the following reasons shall be a reasonable excuse": (1.) that there is not within two miles from the child's residence any public elementary school open which the child can attend, or (2.) that the absence of the child from school has been caused by sickness or any unavoidable cause.

By s. 12, if the attendance order is not complied with, "without any reasonable excuse within the meaning of this Act," a Court of summary jurisdiction may inflict a penalty on the parent.

By s. 48, "Terms in this Act shall, so far as is consistent with the tenor thereof, have the same meaning as in the Elementary Education Acts, 1870 and 1873."

By s. 74 of the Elementary Education Act, 1870, the following reason, amongst others, shall be a reasonable excuse, namely, "that the child is under efficient instruction in some other manner":—

Held, that at the hearing of a summons taken out under s. 12 of the Act of 1876 for non-compliance with an attendance order the parent is entitled to call witnesses for the purpose of shewing that he is providing efficient elementary instruction for the child at home, inasmuch as the meaning of the expression "reasonable excuse" in s. 12 of the Act of 1876 is not confined to the two reasons mentioned in s. 11 of that Act as being a reasonable excuse, but includes the reason mentioned in s. 74 of the Act of 1870, namely, that the child is under efficient instruction in some other manner.

Two rules nisi.

The first rule called upon the respondents, who were certain justices for the West Riding of Yorkshire, to shew cause why a writ of certiorari should not issue to remove into the High Court the records of two convictions by them of the applicant, John William Broadbent, dated February 12, 1910.

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The second rule called upon the respondents to shew cause why they should not hear and determine two informations upon which the convictions of February 12, 1910, respectively took place.

The following were the material facts. On October 13, 1909, an information was preferred against the applicant before justices for the petty sessional division of West Morley, in the West Riding of Yorkshire, charging the applicant with unlawfully habitually and without reasonable excuse neglecting to provide efficient elementary instruction for his daughter Mary Broadbent (who was not less than five nor more than fourteen), notwithstanding that due warning in accordance with s. 11 of the Elementary Education Act, 1876, had been given to him to cause the child to attend some certified efficient school.

There was a second information in the same terms in respect of another daughter, Eleanor Broadbent.

On October 23, 1909, the justices made an order upon each information that the child in respect of whom the information was laid should attend Barkisland endowed school every time the school was open, and that the applicant should use all reasonable efforts to ensure the attendance of the child at that school.

On February 12, 1910, the applicant was charged before justices of the petty sessional division of West Morley upon two informations with having failed to comply with the attendance orders of October 23, 1909.

At the hearing on February 12, 1910, counsel on behalf of the applicant submitted to the justices that pursuant to s. 12 of the Elementary Education Act, 1876, the applicant was entitled to give evidence that he had a reasonable excuse within the meaning of that statute for not complying with the attendance orders, and that it was a reasonable excuse that the children were in fact receiving efficient elementary instruction in some other manner than by attending at school, and he tendered the evidence of witnesses to that effect. The witnesses proposed to be called before the justices on behalf of the applicant were prepared to give evidence that in fact each child was and had been since the date of the attendance orders receiving efficient

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elementary instruction at home, and that, having regard to the state of health and capacity of the children, the instruction which they were and had been receiving was more efficient than the instruction which they would receive in a public elementary school. The justices held that the applicant was not entitled to give the evidence andrefused to hear it, and they convicted the applicant and inflicted a fine upon each information. The rules were then obtained by the applicant upon the ground that the justices refused to hear evidence of a reasonable excuse within the meaning of the Elementary Education Act, 1876 (1),

(1) Elementary Education Act, 1876, s. 11: "If either—

"(1.) The parent of any child above the age of five years who is under this Act prohibited from being taken into full time employment, habitually and without reasonable excuse neglects to provide efficient elementary instruction for his child; . . . . it shall be the duty of the local authority, after due warning to the parent of such child, to complain to a Court of summary jurisdiction, and such Court may, if satisfied of the truth of such complaint, order that the child do attend some certified efficient school willing to receive him and named in the order . . . . and the child shall attend that school every time that the school is open, or in such other regular manner as is specified in the order.

"An order under this section is in this Act referred to as an attendance order.

"Any of the following reasons shall be a reasonable excuse:

"(1.) That there is not within two miles, measured according to the nearest road, from the residence of such child any public elementary school open which the child can attend; or

"(2.) That the absence of the child from school has been caused by sickness or any unavoidable cause."

Sect. 12: "Where an attendance order is not complied with, without any reasonable excuse within the meaning of this Act, a Court of summary jurisdiction, on complaint made by the local authority, may, if it think fit," (inter alia) inflict a penalty on the parent.

Sect. 48: "A child in this Act means a child between the ages of five and fourteen years. Terms in this Act shall, so far as is consistent with the tenor thereof, have the same meaning as in the Elementary Education Acts, 1870 and 1873."

Elementary Education Act, 1870, s. 74, provides that "Any of the following reasons shall be a reasonable excuse; namely,

"(1.) That the child is under efficient instruction in some other manner:

"(2.) That the child has been prevented from attending school by sickness or any unavoidable cause:

"(3.) That there is no public elementary school open which the child can attend within such distance, not exceeding three miles, measured according to the nearest road from the residence of such child, as the bye-laws may prescribe."

for non-compliance with the attendance orders of October 23, 1909.

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Fleetwood Pritchard, for the justices, shewed cause against the rule. The question is whether it is an answer to a summons under s. 12 of the Education Act, 1876, for non-compliance with an attendance order made under s. 11 (which for the purposes of this case must be assumed to be valid) that the child is being properly educated at home. The words "without any reasonable excuse within the meaning of this Act" in s. 12 refer to the two reasonable excuses specified in s. 11, and those are the only two excuses which afford an answer to a complaint under s. 12—*Hewett* v. *Thompson* (1)—and the justices were therefore right in refusing to receive evidence that the child was being educated at home. That evidence would be material on a complaint under s. 11, for then the Court has to consider whether the parent habitually and without reasonable excuse neglects to provide efficient elementary education for his child, and evidence that efficient education was being provided at home would be, not an excuse for failing to comply with the section, but a complete answer to the complaint: *London County Council* v. *Hearn.* (2) Sect. 48 of the Elementary Education Act, 1876, in effect refers to and incorporates s. 3 of the Elementary Education Act, 1870, which is the definition section, but was not intended to refer to the reasonable excuses mentioned in s. 74 of the Act of 1870.

G. M. Edwardes Jones, in support of the rule. If the contention on behalf of the justices is right, it follows that when once an attendance order has been made against a parent he cannot subsequently provide education at home for his child until the child is over fourteen years of age. Sect. 48 of the Elementary Education Act, 1876, provides that the terms in that Act shall have the same meaning as in the Elementary Education Acts, 1870 and 1873. Sect. 74 of the Act of 1870 provides three reasonable excuses for non-attendance at school, one of which is that the child is under efficient instruction in some other manner. Those three excuses must be read into s. 12 of the

(1) (1889) 58 L. J. (M.C.) 60. (2) (1909) 78 L. J. (K.B.) 414.

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Act of 1876: *London School Board* v. *Duggan*. (1) The point was in substance decided in *Hance* v. *Fairhurst*. (2) [He also referred to *In re Murphy*. (3)]

LORD ALVERSTONE C.J. In this case two rules were obtained, one for a writ of certiorari to bring up two convictions of the applicant for non-obedience to attendance orders, and the other for an order directing the justices to hear and determine two informations preferred against the applicant for non-obedience to the attendance orders. The ground upon which the rules were obtained was that the justices refused to hear evidence of a reasonable excuse within the meaning of the Elementary Education Act, 1876, for non-compliance with the attendance orders, which the applicant endeavoured to set up as an answer to the informations. The case is one of difficulty and the material sections are obscure. I am not certain that it is possible to give very clear reasons for the construction which I put upon the sections we have to consider, but I have come to the conclusion that it was not intended by s. 12 of the Elementary Education Act, 1876, to limit the reasonable excuses that might be set up, in answer to a summons for non-obedience to an attendance order, to the two reasonable excuses mentioned in s. 11 of that Act. The provisions of s. 11 relate to a child being ordered to attend school, and s. 12 has reference to the proceedings to be taken if an attendance order is not obeyed. Under s. 11 there is, apart from the reasons given by that section as constituting reasonable excuses, a preliminary question to be decided, namely, whether the parent has habitually neglected to provide efficient elementary instruction for the child. It is admitted that if a parent, in answer to proceedings taken against him under s. 11 for unlawfully "habitually and without reasonable excuse" neglecting to provide efficient elementary instruction for his child, shews that he is providing that which the justices consider to be efficient elementary instruction for the child at home, such evidence affords a complete answer to the summons, and the question whether the parent has a "reasonable excuse"

(1) (1884) 13 Q. B. D. 176. (2) (1877) 2 Q. B. D. 397.
(3) (1882) 51 L. J. (M.C.) 139.

under the section does not arise. Therefore on the hearing of a summons under s. 11 an inquiry takes place as to whether the parent has habitually neglected to provide efficient elementary instruction for the child, and, if so, whether he has a reasonable excuse. The effect of the two reasons being expressly mentioned in s. 11, either of which is a reasonable excuse, is that, although a parent has not provided efficient elementary education for the child, an attendance order cannot be made if there is not a public elementary school within two miles which the child can attend, or the child has been absent by reason of sickness or any unavoidable cause. If an attendance order is made under s. 11 it remains effective subject to certain questions of removal or alteration in the circumstances.

As to the construction of s. 12 of the Elementary Education Act, 1876, it would be a very strong thing to wholly deprive the parent of the right to give efficient elementary instruction to his own child during the whole period of the operation of an attendance order, and I think that it would require clearer language than the section contains to deprive him of that right. Having regard to the general nature of the Elementary Education Act, 1876, the language used in s. 12 seems to imply that that which would have been an answer to a summons issued under s. 11 with a view to an attendance order being made might be an answer to a summons for a breach of the attendance order. I very much doubt whether the reasonable excuses mentioned in s. 11 are meant to be exhaustive. If they are not meant to be exhaustive, the words in s. 12, "any reasonable excuse within the meaning of this Act," must have a wider meaning than the expression "reasonable excuse" as defined under the two heads in s. 11. Sect. 48 of the Elementary Education Act, 1876, provides that terms in that Act shall so far as is consistent with the tenor thereof have the same meaning as in the Elementary Education Acts, 1870 and 1873. We are therefore thrown back to s. 74 of the Elementary Education Act, 1870, which provided that the fact that the child was under efficient instruction in some other manner afforded a reasonable excuse for non-compliance with the requirements of that Act. It is therefore, to say the least, doubtful whether the two reasons mentioned in

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s. 11 of the Act of 1876 are meant to be exhaustive, and it is not unreasonable to hold that the words "any reasonable excuse within the meaning of this Act" contained in s. 12 are at least as wide as the words "reasonable excuse" in s. 74 of the Act of 1870. The authorities appear to support that view. The decision in *Belper School Attendance Committee* v. *Bailey* (1) dealt with a by-law respecting attendance, and therefore the mischief aimed at by the provisions which were in question in that case was of the same kind as that aimed at by the provisions which we are now considering. The by-law contained in substance the same reasonable excuses as those mentioned in the Elementary Education Act, 1870, and it was held that there might be other reasonable excuses within the meaning of the by-law besides the three reasons therein specified. In *London School Board* v. *Duggan* (2), where the question again arose under a by-law which provided that any of the following reasons should be a reasonable excuse for non-attendance, namely, that the child was under efficient instruction in some other manner, that the child had been prevented from attending school by sickness or any unavoidable cause, or that there was no public elementary school open, which the child could attend, within two miles from the child's residence, it was shewn that non-attendance was caused by the child, a girl aged twelve, with fair elementary instruction, having been in respectable employment, earning wages, which she gave to her parents, who were poor, industrious, and respectable people and applied them to the support of their other children, whom otherwise the parents from no fault of their own would have been unable sufficiently to support, and it was held that these facts constituted a reasonable excuse for non-attendance. In my judgment that decision supports the contention that it was open to the applicant in the present case to give evidence before the justices that he was efficiently educating the child at home, and that a person is not deprived of the right of complying with the statute in a way other than that mentioned in an attendance order because in a certain state of circumstances the attendance order was made against him.

(1) (1882) 9 Q. B. D. 259. (2) 13 Q. B. D. 176.

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BRAY J. I am of the same opinion. The applicant was summoned for not complying with an attendance order, and he sought to set up, as a reasonable excuse, the fact that he was providing efficient elementary education at home for the child. The justices refused to hear the evidence on the ground that the applicant was confined to the two particular excuses mentioned in s. 11 of the Elementary Education Act, 1876. The question is whether that ruling is right in law. The words in s. 12 which we have to construe are "without any reasonable excuse within the meaning of this Act." On behalf of the justices it is contended that those words refer exclusively to the two reasons mentioned in s. 11. I do not think that that is a fair interpretation of the language. If it had been intended to confine the reasonable excuse mentioned in s. 12 in that way, the section would have said so in terms in the same manner as s. 11. I am therefore unable to adopt that interpretation of the language of s. 12. It was contended that under s. 11 only the two reasons mentioned in that section were intended to be reasonable excuses. We are, however, precluded by authority from saying so, because exactly the same words are used in s. 74 of the Elementary Education Act, 1870, and it has been in effect decided in *Belper School Attendance Committee* v. *Bailey* (1) and in *London School Board* v. *Duggan* (2) that those words are not exhaustive. In *Belper School Attendance Committee* v. *Bailey* (1) Lopes J. said: "I think the by-law means that the child shall attend school unless there is reasonable excuse, and then three illustrations of reasonable excuses are given. But the justices may act on other reasonable excuses." The authorities are therefore clear, but apart from them I should come to the same conclusion and hold that the two reasonable excuses mentioned in s. 11 of the Elementary Education Act, 1876, are not exhaustive. Therefore I do not think that it is right to say that a reasonable excuse under s. 12 of that Act is confined to the two reasons given in s. 11.

If that be so, what is the meaning of "reasonable excuse"? Sect. 12 of the Elementary Education, Act, 1876, says "any

(1) 9 Q. B. D. 259. (2) 13 Q. B. D. 176.

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reasonable excuse within the meaning of this Act." One would expect from that that there would be a definition of the expression "reasonable excuse." But although there is a definition clause in the Act of 1876, the expression "reasonable excuse" is not defined specifically. By s. 48 of the Act of 1876, however, it is enacted that "Terms in this Act shall, so far as is consistent with the tenor thereof, have the same meaning as in the Elementary Education Acts, 1870 and 1873," and in the Act of 1870 the words "reasonable excuse" are used and have been judicially interpreted as meaning any reasonable excuse. This interpretation appears to me to be founded upon good sense. If a person gives any reasonable excuse why should he be fined? If he is liable to a fine it would follow that when once an attendance order has been made in respect of a child, that child must for ever after attend the particular school mentioned in the order and no other, and the parent cannot educate his child at home, so that, however the circumstances may change, it would not be open to the justices to consider whether the child is being efficiently educated. It appears to me that s. 4 of the Act of 1876, which says that "It shall be the duty of the parent of every child to cause such child to receive efficient elementary instruction in reading, writing, and arithmetic, and if such parent fail to perform such duty, he shall be liable to such orders and penalties as are provided by this Act," shews that the parent is not to be punished so long as the child is receiving efficient elementary instruction.

PICKFORD J. I agree. I have had considerable doubt whether the words "reasonable excuse" in s. 12 of the Elementary Education Act, 1876, were not intended to be confined to the reasonable excuses mentioned in s. 11 of that Act. But as s. 48 of the Act of 1876 introduces for the purpose of definition the Act of 1870 and enacts that "Terms in this Act shall, so far as is consistent with the tenor thereof, have the same meaning as in the Elementary Education Acts, 1870 and 1873," I think the result is that the authorities under the Act of 1870 as to the meaning of reasonable excuse are also authorities under the Act of 1876, and that those authorities shew that the meaning of the

expression " reasonable excuse " in the Act of 1876 is not confined to the reasonable excuses specifically named in s. 11.

Rules absolute.

Solicitor for applicant: *J. A. Collins.*

Solicitors for respondents: *Clements, Williams & Co., for W. Vibart Dixon, Wakefield.*

J. E. A.

THE KING *v.* LOCKE.

1910
April 19;
May 10.

Local Government — Municipal Corporation — Urban Authority — Borrowing Powers — Obligation on Corporation to mortgage Rates by way of Security for Loan — Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 233.

The borrowing powers conferred upon an urban authority by s. 233 of the Public Health Act, 1875, do not enable it to borrow money (for other than temporary purposes) without securing the repayment of the loan by a mortgage of the rates or fund on the credit of which the money is borrowed. Therefore a payment of interest made on behalf of the authority upon money borrowed for a permanent purpose without security is illegal.

RULE NISI calling upon the respondent H. Locke, the auditor appointed to examine the accounts of the Corporation of Bournemouth for the financial year ended March 31, 1909, to shew cause why a writ of certiorari should not issue directed to him to remove into the High Court a certain certificate of disallowance and surcharge made by him (together with his reasons and grounds for the same) and dated September 10, 1909, of the sum of 2*l.* 12*s.* 6*d.* disallowed and surcharged upon the applicants, certain members of the council of the borough of Bournemouth, who authorized the payment and signed the cheque by which the payment was made, which sum was part of a sum of 5561*l.* 0*s.* 6*d.* paid to the National Provincial Bank of England, Limited, on or about October 29, 1908. The rule was obtained by the applicants upon the ground that the 2*l.* 12*s.* 6*d.* disallowed was interest upon a loan which the corporation were authorized to borrow by s. 233 of the Public Health Act, 1875 (1), and was payable out of the district fund by virtue of s. 207 of that Act.

(1) Public Health Act, 1875, s. 233: "Any local authority may, with the sanction of the Local Government Board, for the purpose

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The following statement of facts is in substance taken from the judgment of Lord Alverstone C.J. On April 3, 1900, the Local Government Board sanctioned the borrowing by the Bournemouth Corporation of the sum of 600*l.*, to be borrowed on the credit of the charges on rates, which the corporation were entitled to mortgage, for the purpose of securing the repayment thereof together with interest, the amount to be repaid with interest within ten years from the date of borrowing thereof. In accordance with this sanction, on May 10, 1900, the corporation borrowed from the Wilts and Dorset Bank the sum of 600*l.*, and mortgaged a certain proportion of the rates, charges, and assessments as security for the advance. In February, 1902, steps were taken with a view to transferring the corporation's account to the National Provincial Bank, and in pursuance of the arrangement hereinafter referred to the National Provincial Bank repaid the principal and interest due to the Wilts and Dorset Bank upon this and a large number of other loans advanced on mortgage by the Wilts and Dorset Bank. The mortgages were not transferred to the National Provincial Bank, but receipts for the money were indorsed thereon. The terms of the arrangement with the National Provincial Bank (which were approved by the finance committee of the corporation on March 25, 1902, and confirmed by the council on April 1, 1902) were as follows :—

The bank to advance to the corporation 500,000*l.* upon the following terms:

(1.) Interest to be bank rate, with a minimum of $3\frac{1}{2}$ per cent. and a maximum of $4\frac{1}{2}$ per cent.

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of defraying any costs charges and expenses incurred or to be incurred by them in the execution of the Sanitary Acts or of this Act, or for the purpose of discharging any loans contracted under the Sanitary Acts or this Act, borrow or reborrow, and take up at interest, any sums of money necessary for defraying any such costs charges and expenses, or for discharging any such loans as aforesaid.

"An urban authority may borrow or reborrow any such sums on the credit of any fund or all or any rates or rate out of which they are authorised to defray expenses incurred by them in the execution of this Act, and for the purpose of securing the repayment of any sums so borrowed, with interest thereon, they may mortgage to the persons by or on behalf of whom such sums are advanced any such fund or rates or rate . . . ."

(2.) The corporation to undertake as soon as the advances have reached 250,000*l.* or 300,000*l.*, if called upon so to do by the bank, to issue stock at such price as the bank may advise, not to be below 94 (on the assumption that the stock will be a trustee stock), the corporation to bear the expenses of underwriting, whatever they may be.

(3.) The banking account of the corporation to be transferred to the National Provincial Bank.

(4.) The stock to be issued through the National Provincial Bank, and that bank to be constituted registrars of the existing as well as future stock, assuming that future stock would be issued pari passu with and as one and the same stock as existing. The cost of issue to be as follows:—Underwriting (in present state of market), 1 per cent., with an additional $\frac{1}{4}$ per cent. to brokers; $\frac{1}{4}$ per cent. on all successful applications made by brokers; the bank fee would be $\frac{1}{8}$ per cent. on nominal amount of stock offered; the brokers to make no charge for name appearing on prospectus or giving advice; brokers' charge for Stock Exchange quotation, 52*l.* 10*s.*; 200*l.* to 250*l.* advertising (this would be greatly at discretion of the corporation); 80*l.* to 100*l.* printing books and stationery; $\frac{1}{8}$ per cent. Government duty on amount issued; annual costs of management by bank, 1 per cent. on amount of each year's dividend, with a minimum of 50*l.* For this the bank would keep the register, ask for the money necessary to pay the dividends, and prepare and pay the dividends as they came due.

(5.) The bank would charge interest on moneys due to the bank only on the amount of the excess of sums borrowed over balances standing to the credit of the corporation, the sum of 1000*l.* to 1500*l.* being allowed as a "free balance" upon which no interest is to be allowed.

(6.) The banking account to be opened in the name of the mayor, aldermen, and burgesses of the county borough of Bournemouth, and to be operated upon by cheques signed by a member of the council, the borough treasurer, and the borough accountant. In the temporary absence of the borough treasurer from illness or other cause the sub-manager of the bank to be given authority to sign for him.

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(7.) The form of cheque to be used to be according to the specimen attached hereto.

No mortgages or other documents securing the National Provincial Bank were executed, and the grounds of the surcharge were as stated in the auditor's certificate, namely:—

"(1.) Because on the evidence before me the council have borrowed moneys without giving any proper security for the sums advanced.

"(2.) Because moneys borrowed by the council under the provisions of s. 233 of the Public Health Act, 1875, to defray expenses incurred by them in the execution of the Act can only be borrowed on the credit of the fund or rate out of which the council are authorized to defray such expenses.

"(3.) Because the borrowing powers of the council are subject to statutory conditions, and in dispensing with the whole or any part of such conditions they are acting contrary to law, and any payment of interest on moneys borrowed without the fulfilment of the statutory conditions in that behalf is illegal: *Attorney-General* v. *De Winton*. (1)

"(4.) Because the council have no expressed or implied authority to borrow moneys other than in the manner authorized by statute: *Reg.* v. *Reed*. (2)

"(5.) Because there is no authority in law for the payment of interest on moneys borrowed in the manner here adopted and on which interest purports to have been paid."

Macmorran, K.C. (*S. A. T. Rowlatt* with him), for the auditor, shewed cause. The Corporation of Bournemouth has no power to borrow money except in accordance with the powers conferred upon it by statute. These powers are mainly conferred by the Public Health Act, 1875. Sect. 233 of that Act shews that the corporation can only borrow with the sanction of the Local Government Board, and only on the security of a mortgage of the fund or rates on the credit of which the money is borrowed. By s. 234 certain limits are placed on the borrowing powers of the corporation. Sect. 235 confers additional borrowing powers and contains an express power to borrow on mortgage of sewage land and plant.

(1) [1906] 2 Ch. 106. (2) (1880) 5 Q. B. D. 483.

Sect. 236 relates to the form in which mortgages are to be made, and s. 237 contains a provision which is of the highest importance, that a register of mortgages upon rates shall be kept and shall be open to public inspection. Sect. 238 provides for a register of transfer of mortgages. It is clear from these sections that the power of the corporation to borrow is statutory only, and that the regulations contained in them must be complied with. If the corporation can borrow without giving any security by way of mortgage there might be a large loan by the bank to the corporation and nothing to earmark it. The object of the statutory regulations would be thereby defeated, because an intending lender who inspected the register of mortgages would be deprived of the means of ascertaining what the true extent of the indebtedness of the corporation was at that time. A corporation may borrow temporarily without security: *Attorney-General* v. *De Winton* (1); but if it borrows for any other than a temporary purpose, it can only do so subject to the regulations of the statute which authorizes it to borrow: *Reg.* v. *Reed* (2); *Smith* v. *Southampton Corporation* (3); *Wenlock* (*Baroness*) v. *River Dee Co.* (4) The first paragraph of s. 233 of the Public Health Act, 1875, confers a power to borrow on any local authority and must be read together with the second paragraph of the section, which relates to borrowing by an urban authority. [The Local Loans Act, 1875 (38 & 39 Vict. c. 83); the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), Part V.; the Poor Law Audit Act, 1848 (11 & 12 Vict. c. 91), s. 4; and Lumley's Public Health Acts, 7th ed., pp. 534, 898, and 1554, were also referred to.]

Danckwerts, K.C., and *Fleetwood Pritchard*, in support of the rule. The word "may" is used throughout s. 233 of the Public Health Act, 1875, and shews that the corporation has the option of borrowing upon security of mortgages or without security. It is necessary to read the word "may" as "shall" if the section is to be construed as making it obligatory upon the corporation to borrow on mortgage, which would be contrary to the decision in *Julius* v. *Bishop of Oxford.* (5) The Legislature cannot have

(1) [1906] 2 Ch. 106.
(2) 5 Q. B. D. 483.
(3) [1902] 2 K. B. 244.
(4) (1885) 10 App. Cas. 354.
(5) (1880) 5 App. Cas. 214.

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intended that the corporation should be compelled to force a security upon a lender who is willing to lend without it. Every borrowing by a corporation is necessarily upon the credit of a fund or rate whether a mortgage is given or not. A lender must be considered to know that a corporation can only borrow on the credit of a particular fund or rate, and he therefore, as a matter of law, lends on the credit of the fund or rate. The Local Government Board did not impose any conditions, in giving their sanction, as to borrowing on mortgage of the rates. When the Wilts and Dorset Bank was repaid, the National Provincial Bank was subrogated to the rights of the Wilts and Dorset Bank except as regards the securities taken by the Wilts and Dorset Bank which the National Provincial Bank was only entitled to by agreement. If the Legislature had intended that the corporation must borrow on mortgage the words "on mortgage of the rates" would have been used in s. 233 of the Public Health Act, 1875, after the words "borrow or reborrow." [*In re Wrexham, Mold, and Connah's Quay Ry. Co.* (1) and the Public Health Acts Amendment Act, 1890, s. 52, were also referred to.]

Cur. adv. vult.

May 10. The following judgment of the COURT (Lord Alverstone C.J., Bray and Pickford JJ.) was read by

LORD ALVERSTONE C.J. In this case a rule nisi for a writ of certiorari was obtained to quash certain surcharges made by the auditor of the accounts of the Bournemouth Corporation whereby he had surcharged upon certain members of the corporation a payment of 2*l.* 12*s.* 6*d.* paid by cheque, signed by the persons surcharged, to the National Provincial Bank in respect of interest upon the sum of 600*l.* The material facts are not in dispute. [Having stated them, his Lordship continued.] The question raised, and on which the parties desire a decision, is whether the payment of interest to the bank in respect of loans made by the bank, for which no security had been issued, is legal. The question turns almost entirely upon certain provisions of

(1) [1899] 1 Ch. 440.

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the Public Health Act, 1875. It was contended by Mr. Danckwerts, on behalf of those who objected to the surcharge, that under s. 233 of the Public Health Act, 1875, provided the sanction of the Local Government Board has been given to a loan, the local authority may borrow the money in any way they please, and are not bound to give any security in respect of the money so borrowed. He contended, upon the authority of *Julius* v. *Bishop of Oxford* (1), that the use of the words "may mortgage" in the second paragraph of the section left it quite optional to the local authority whether they would give a mortgage or not, and that if they could arrange for the advance of the money without giving security it was within their power to do so. To a certain extent we agree with this argument. The powers of borrowing with the sanction of the Local Government Board include the borrowing of money for the purpose of defraying any costs, charges, or expenses incurred, or to be incurred, by the local authority in the execution of the Sanitary Acts or of the Public Health Act, 1875, and if the transaction objected to was merely the payment of interest upon some temporary loan obtained for temporary purposes until other money—as, for instance, rates or moneys agreed to be advanced—were in fact received, we agree that it might not be necessary under such circumstances for the local authority to give security. We refer to the judgment of this Court in *Smith* v. *Southampton Corporation* (2), and particularly the passage in our brother Channell's judgment on p. 254, in which we entirely concur: "Nothing that I am saying, and nothing that my Lord has said, is to be taken as in any way suggesting that there would be anything wrong in the course which must practically always be taken, that is, in raising temporary loans within the limits of the borrowing powers in respect of matters which require to be paid quickly, the local authority intending at some future date to raise one large loan by an issue of stock, and having necessarily to incur some small expenditure before the loan is raised; obviously a temporary loan from the bankers for such a purpose would stand upon a very different footing from what has been done here." The case with which we have to deal is not one of the class there

(1) 5 App. Cas. 214. (2) [1902] 2 K. B. 244.

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mentioned. The arrangement approved by the finance committee of the corporation on March 25, 1902, was an agreement by the bank to finance up to 500,000*l.* at a minimum rate of interest of 3½ per cent. and maximum of 4½ per cent., and the corporation agreed, if called upon, as soon as the advances reached 250,000*l.*, to issue stock at not less than 94, the consideration of the arrangement being the transfer of the corporation bank account to the National Provincial Bank. In our opinion this cannot be regarded as merely a temporary arrangement within the class of case to which we have referred. It seems to us to be an exercise of borrowing powers for the purpose of permanent loans to be repaid by instalments.

The question, then, whether "may" is to be read as giving the local authority a discretion as to whether they would issue a mortgage or not does not in our opinion afford the true test by which the case is governed. Sect. 233 of the Public Health Act, 1875, gave power to borrow on mortgage. Sect. 234 gave important regulations as to the exercise of borrowing powers. Sects. 236, 237, and 238 provide for the register and transfer of mortgages; and it seems to us that the object of these sections is that intending lenders and ratepayers should be able to ascertain what is the existing position of the corporation in the matter of moneys they have borrowed. This protection would be entirely frustrated if loans for amounts which really represent the principal of all the advances sanctioned could be carried out by an arrangement of the kind suggested. The Local Loans Act, 1875, provides another method of obtaining loans by means of debenture stock, certificates, &c., and important provisions are again made as to registration and as to the regulations under which such securities may be issued, and, again, Part V. of the Public Health Acts Amendment Act, 1890, provides for the creation of corporation stock. In all these cases the consent of the Local Government Board is required, and in our opinion that consent does not merely involve the consent to the loan, but an approval of the way in which the loan is to be secured according to the Act of Parliament under which the securities are issued. This is a case, therefore, of action by an authority

that has limited powers, of which limited powers, as was truly pointed out by Mr. Danckwerts in supporting the rule, the public are assumed to have notice. In the circumstances we are unable to construe the words in the opening part of the second paragraph of s. 233 as giving the wide powers which Mr. Danckwerts contended that they confer, in respect of a transaction which is in reality the exercise of the borrowing powers, to extend over many years and in respect of advances which are to be repaid in different terms of years. By such an arrangement all the safeguards for the protection of ratepayers and possible lenders by notice, registration, and otherwise of previous loans are disregarded. As regards the authorities, there is no case that raises the exact point argued in this case, but it seems to us that the principle which underlies the decisions in *Reg.* v. *Reed* (1) and *Attorney-General* v. *De Winton* (2) supports the view which we have taken.

In support of the rule Mr. Danckwerts attempted to justify the payment upon the ground that the National Provincial Bank were entitled to stand in the shoes of the Wilts and Dorset Bank and to be treated for the purposes of this surcharge as though they were transferees of the particular mortgage which secured the 600*l.* advanced by the Wilts and Dorset Bank. No such point appears to have been raised before the auditor. As a matter of fact the mortgages were surrendered to the corporation and were not in existence at the time when the payment was made, so that in our opinion this contention cannot be allowed to prevail under the circumstances of this case. The rules must be discharged with costs. The costs may be paid out of the rates.

Rules discharged.

Solicitors for applicants: *Chester, Broome & Griffithes.*
Solicitors for respondent: *Sharpe, Pritchard & Co.*

(1) 5 Q. B. D. 483. (2) [1906] 2 Ch. 106.

J. E. A.

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April 12.

THE KING *v.* THE JUSTICES OF WALSALL.
THE KING *v.* THE LICENSING JUSTICES OF WALSALL.

Licensing Acts—Renewal of Licence—Refusal by Compensation Authority to renew—Payment of Compensation—Premises of less than requisite Statutory Value—Refusal to proceed with Assessment of Compensation—Refusal of Licensing Justices to grant further provisional Renewal of Licence—Beerhouse Act, 1840 (3 & 4 *Vict.* c. 61), *s.* 1—*Licensing Act*, 1904 (4 *Edw.* 7, c. 23), *ss.* 1, 2—*Licensing Rules*, 1904, *rr.* 31, 41, 42, 43.

The question of the renewal of an on beer licence, which had been continuously in force since a date before 1869, was referred by the licensing justices to the compensation authority, the ground of objection being that the licence was not required, and a provisional renewal was granted. The compensation authority refused the renewal, and upon the question coming before the compensation authority whether they should approve the amount of compensation money agreed upon between the persons interested in the licensed premises it appeared that the annual value of the premises was less than that required by s. 1 of the Beerhouse Act, 1840. The compensation authority thereupon refused to approve the amount of compensation money agreed upon or to send the matter to be determined by the Commissioners of Inland Revenue. At the next general annual meeting the licensee applied for a further provisional renewal of the licence under r. 43 of the Licensing Rules, 1904, the compensation money not having been paid and not being likely to be paid before April 5 following, but the licensing justices, upon notice of objection duly given, refused to grant the renewal upon the ground that the annual value of the premises was less than that required by the Act:—

Held—(1.) that the compensation authority, having refused the renewal of the licence, were not entitled to entertain the question of the annual value of the premises, but were bound either to approve the amount of the compensation money agreed upon or to send the matter for determination to the Commissioners of Inland Revenue; and (2.) that the licensing justices at the next general annual licensing meeting were not entitled to entertain the question of the annual value of the premises, but were bound under r. 43 of the Licensing Rules, 1904, inasmuch as the compensation money had not been paid and was not likely to be paid before April 5 following, to grant a further provisional renewal of the licence.

THESE two cases were heard together.

The rule in the first case was a rule calling upon the justices in and for the county borough of Walsall, acting as the compensation authority for the borough under the Licensing

Act, 1904, to shew cause why a writ of mandamus should not issue directed to them, commanding them as such compensation authority to send notice to the Commissioners of Inland Revenue of the fact that the compensation money payable under the Act in respect of the Tanners Arms beer-house situate in the borough remained to be determined otherwise than by means of an agreement approved by the compensation authority, together with a statement of the names and addresses of the persons entitled to compensation, upon the ground that the compensation authority had no jurisdiction to consider any question of the validity of the licence on the ground of value.

The rule in the second case was a rule calling upon the licensing justices for the county borough of Walsall, acting as the renewal authority for the borough, to shew cause why a writ of mandamus should not issue directed to them, commanding them to hold within a reasonable time a further adjournment of the general annual licensing meeting for the borough holden by adjournment on February 25, 1910, and to cause notice to be given of the time and place for holding such further adjournment, and at such further adjournment to proceed to hear and determine pursuant to the statutes in that behalf the matter of an application for the renewal of a provisional licence pursuant to r. 43 of the Licensing Rules, 1904, to Jane Duddy to sell beer at the Tanners Arms beer-house situate in the borough upon the ground that the justices had no jurisdiction to receive or consider evidence as to the value of the premises, and were bound to renew the provisional licence, as the compensation money had not been paid and was not likely to be paid before April 5, 1910.

The Tanners Arms was a beer-house in Walsall, and from a date before 1869 down to February 5, 1909, a licence to sell beer by retail to be consumed on or off the premises had been held in respect thereof. One Jane Duddy was the holder of the licence granted in respect of the premises.

Upon January 19, 1909, a notice under s. 42 of the Licensing Act, 1872, was served on behalf of the licensing justices for the borough of Walsall on Jane Duddy that an objection would be made

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to the renewal of her licence for the Tanners Arms upon the ground that the licence was not required for the needs of the district. No question was raised as to the annual value of the premises. (1) At the general annual licensing meeting held on February 5, 1909, Jane Duddy duly applied for a renewal of the licence, and the licensing justices decided to refer the matter to the compensation authority for the borough under s. 1 of the Licensing Act, 1904, and granted a provisional renewal of the licence under r. 41 of the Licensing Rules, 1904. Upon June 8, 1909, the principal meeting of the compensation authority for the borough was held, and the compensation authority refused to renew the licence, whereupon compensation became payable under s. 2 of the Act. In the particulars of the claim for compensation by the persons interested in the licensed premises the annual value of the premises unlicensed was stated to be 10*l.* 12*s.*, and before the supplemental meeting was held the amount of compensation was agreed upon between the parties. At the supplemental meeting of the compensation authority held on August 26, 1909, for the purpose of considering the nature of the claims to compensation and of determining whether approval should be given to any sum agreed upon by the parties, the valuer who was called on behalf of the claimants, upon his attention being called to the annual value of the premises, stated that the premises without a licence were not of a higher value than 10*l.* 12*s.*, as stated in the claim, and that he adhered to that figure. (2) The compensation authority thereupon stated that, inasmuch as the annual value of the premises was below the statutory requirements (3), they would have to consider what was the legal position

(1) In the printed notice of objection which was served the ground that the premises were not of the requisite annual value was struck out.

(2) The affidavits filed on behalf of the justices stated that this was the first occasion upon which the annual value of the premises had been brought to the notice of the justices.

(3) By the Beerhouse Act, 1840 (3 & 4 Vict. c. 61), s. 1, as amended by s. 46 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), no licence to sell beer or cider by retail shall be granted in respect of any dwelling-house which shall not with the premises occupied therewith be rated for the relief of the poor on an annual value of 15*l.* at the least if situated within any city, town, or place the population of which exceeds 10,000; and "every licence

with the view of seeing what was the proper course for them to take, namely, whether the licence was not null and void, and consequently whether there was a licence the loss of which formed the subject-matter for compensation; and at a subsequent meeting they came to the conclusion that they could not approve and pay any compensation money without first communicating with the renewal authority (the licensing justices) and obtaining their finding and decision upon the question of the annual value of the premises, and they decided that the consideration of the compensation claimed should stand over, and directed their clerk to notify the renewal authority accordingly. Thereupon the claimants for compensation demanded that, as the amount of compensation money remained to be determined otherwise than by means of an agreement approved by the compensation authority, the authority should forthwith send to the Commissioners of Inland Revenue the notice and statement provided by r. 31 of the Licensing Rules, 1904 (1); and upon the compensation authority failing to do so, the first of the above rules nisi for a mandamus, namely, that directed to the justices for the county borough of Walsall acting as the compensation authority, was upon January 21, 1910, obtained at the instance of the claimants.

Upon January 24, 1910, a notice was served on behalf of the licensing justices of Walsall as the renewal authority upon Jane Duddy, under s. 42 of the Licensing Act, 1872, requiring her, in case she wished to apply for the renewal of the licence in respect of the Tanners Arms, to attend personally at the general annual licensing meeting to be held on February 2 and to shew cause why the licence should be granted, and stating that it was their intention to oppose the renewal of the licence upon the ground that the premises were not of the requisite annual

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granted contrary hereto shall be null and void."

Walsall was a town with a population exceeding 10,000.

(1) Rule 31 of the Licensing Rules, 1904: "If the amount of compensation money remains to be determined otherwise than by means of an agreement approved by the compensation authority, the compensation authority shall send a notice of the fact to the Commissioners of Inland Revenue, accompanied by a statement of the names and addresses of the persons entitled to compensation."

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value or otherwise duly qualified. At the general annual licensing meeting an application was made on behalf of Jane Duddy under r. 43 of the Licensing Rules, 1904 (1), for a further provisional renewal of the licence, and the licensing justices appointed a valuer under the powers of s. 47 of the Licensing Act, 1872, to report to them as to the annual value of the premises without a licence, and the hearing was adjourned to February 25. At the adjourned meeting an application was again made on behalf of Jane Duddy for a further provisional renewal of the licence, it being admitted that the compensation money had not been paid and was not likely to be paid before April 5, 1910. The licensing justices, notwithstanding the protest of the solicitor who appeared for the applicant, proceeded to hear evidence in support of the objection as to the value of the premises, the applicant through her solicitor declining to take any part in the inquiry. The licensing justices found as a fact that the premises were not then nor were they at any time during the year 1909 of the requisite statutory annual value, and they refused to grant a further provisional renewal of the licence.

(1) Licensing Rules, 1904, r. 41: "Where under section 1 of the Act the renewal authority refer the question of the renewal of a licence to the compensation authority, the renewal authority shall grant the renewal of the licence in accordance with the terms of the application, but shall insert in the licence a statement as to the renewal of the licence being provisional."

Rule 42: "If the compensation authority refuse the renewal of any licence, the renewal of which is provisional . . . . the licence shall cease to have effect as from the expiration of the seventh day after the date fixed under these rules for the payment of the compensation money."

Rule 43: "Where compensation becomes payable in the case of a licence provisionally renewed, and it appears to the renewal authority at the next general annual licensing meeting after the licence has been provisionally renewed that the compensation money has not been paid and is not likely to be paid before the next fifth day of April, they shall, on a proper application being made for the purpose at that meeting, grant a further provisional renewal of the licence in accordance with the foregoing rules."

By r. 2, "the Act" means the Licensing Act, 1904; "the compensation authority" means as respects a county borough the whole body of justices acting in and for the borough; and "the renewal authority" means the justices having power to renew a licence.

The second of the above rules nisi for a mandamus, namely, that addressed to the licensing justices for the county borough of Walsall, was thereupon obtained on March 10, 1910, and the two rules were ordered to be heard together.

With regard to the first rule,

C. A. Russell, K.C., and *W. Mackenzie* shewed cause. When the evidence adduced on behalf of the applicants shewed that the annual value of the premises, if unlicensed, was less than 15*l.*, the compensation authority were bound to refuse to assess the compensation. By s. 1 of the Beerhouse Act, 1840, as amended by s. 46 of the Licensing Act, 1872, no licence to sell beer or cider by retail shall be granted in respect of any premises which are not of the annual value of 15*l.* within any town or place of which the population exceeds 10,000, and every licence granted contrary thereto is to be null and void. This provision applies to premises which were licensed under the Wine and Beerhouse Acts at the time of the passing of the Licensing Act, 1872, and therefore applies to the Tanners Arms. The licence, if renewed, being void, there was no licence for the non-renewal of which compensation could be payable. One of the conditions precedent to its renewal was absent. The compensation authority did not raise the question of value, but the applicants' evidence shewed that the premises were under the requisite value. The question of value was not raised before the licensing justices when they referred the question of the renewal of the licence to quarter sessions, and therefore they did not adjudicate upon it. Nor did the compensation authority adjudicate upon that question, but merely refused to proceed with the determination of the amount of compensation, leaving the question of value to be raised before the licensing justices at the next general annual licensing meeting so that it might be adjudicated upon by the proper tribunal. Upon the applicants' evidence before the compensation authority it will be useless to send the question as to the amount of compensation to the Commissioners of Inland Revenue, who will at once raise the question that the licence is void upon the ground that the premises are under the required value. Only one result can follow, and the

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Court will not grant a mandamus for no useful purpose. Sect. 2 sub-s. 2, of the Licensing Act, 1904, can only be read as requiring the question of the amount of compensation to be determined by the Commissioners, where some compensation is payable. If there is no question of amount there can be no reference to the Commissioners. Moreover, the question of the annual value of the premises has already been adjudicated upon by the licensing justices at the adjourned general annual licensing meeting on February 25, 1910, and they have found that the annual value is less than 15*l*. The mandamus upon that ground also ought to be refused, as it can serve no useful purpose.

Avory, K.C., and *Disturnal*, in support of the rule. The compensation authority had no jurisdiction to inquire into the question of the annual value of the premises. When the renewal of a licence has been refused under s. 1 of the Licensing Act, 1904, and the amount of compensation agreed upon between the persons interested is not approved by the compensation authority, the amount must, under s. 2, sub-s. 2, be determined by the Commissioners of Inland Revenue. Sect. 9, sub-s. 3, of the Act repeals s. 19 of the Wine and Beerhouse Act, 1869, and in the case of licences to which s. 19 applies it substitutes the grounds mentioned in s. 8 of the Act of 1869 for the grounds mentioned in s. 1, sub-s. 1, of the Act of 1904 as the grounds on which the power to refuse the renewal of an existing on licence is reserved to the licensing justices. One of the grounds mentioned in s. 8 of the Act of 1869 is that the house is not qualified as required by law. That is a ground of objection of which notice ought to be given to the licensee—*Reg.* v. *Farquhar* (1)—and which must be adjudicated upon by the licensing justices. The compensation authority have no jurisdiction to refuse the renewal of a licence upon that ground. Their duty is defined by s. 1, sub-s. 2, of the Act of 1904, namely, to consider, on a reference from the licensing justices, whether they will grant or refuse the renewal of an on licence upon some ground other than that on which the licensing justices can refuse the renewal. If they refuse the renewal, then by s. 2, sub-s. 1, compensation becomes payable. Moreover, by virtue of s. 46 of the Licensing Act, 1872, the premises must

(1) (1874) L. R. 9 Q. B. 258.

"in the opinion of the licensing justices" be of the annual value of 15*l.*, "annual value" being defined in s. 47, and as no objection to value was taken before the licensing justices when the question of renewal was in February, 1909, referred to the compensation authority, it is impossible to say that in the opinion of the justices who were present at the general annual licensing meeting in that year the premises were not of the annual value of 15*l.* The licence, if renewed by the licensing justices, is not null and void under s. 1 of the Beerhouse Act, 1840, upon the ground that the premises are subsequently ascertained to be of less value than 15*l.*, inasmuch as that question of value is left by s. 46 of the Licensing Act, 1872, to be determined solely by the licensing justices at the general annual licensing meeting upon a proper notice of objection being given. The licence has been renewed each year continuously since a date before May, 1869, upon the footing that the premises were of the required value, and no notice of objection has ever been served upon the licensee upon that ground. The premises are, in fact, of a greater annual value than 15*l.*, but this is immaterial, because neither the compensation authority nor the Commissioners of Inland Revenue have any jurisdiction to go into that question. The duty of the former is to approve or refuse to approve of, and the duty of the latter is to assess, the amount of compensation. The compensation authority having refused the renewal of the licence, everything that follows is merely in the nature of machinery to enable the compensation to be properly adjusted: *Plaistow Working Men's Club* v. *Harrod* (1); and having done so, and the parties not having agreed upon the amount of compensation, the compensation authority are bound to send notice of that fact, under r. 31 of the Licensing Rules, 1904, to the Commissioners of Inland Revenue, for the purpose of setting in motion the machinery for assessing the compensation. The rule ought therefore to be made absolute.

With regard to the second rule,

C. A. Russell, K.C., and *W. Mackenzie* shewed cause. The licensing justices had jurisdiction under s. 1 of the Beerhouse

(1) [1910] 1 K. B. 582, at p. 589.

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Act, 1840, and ss. 46 and 47 of the Licensing Act, 1872, upon the application for a further provisional renewal of the licence at the general annual licensing meeting in February, 1910, to inquire into the objection, of which notice had been given, that the premises were not of the annual value of 15*l*. A provisional renewal of a licence is for this purpose in the same position as an ordinary licence as defined in s. 74 of the Licensing Act, 1872, just as a six-day licence is in the same position as an ordinary licence though limited to six days. Though it is not an "existing on licence renewed" within the meaning of s. 3, sub-s. 1, of the Licensing Act, 1904—*Malkin* v. *The King* (1)—it is an "on licence" as defined in s. 9, sub-s. 4, of the Licensing Act, 1904, and it is granted subject to all the conditions applicable to an ordinary licence. One of those conditions is that the premises shall be and continue to be of a certain annual value. Under rr. 41—43 of the Licensing Rules, 1904, which deal with "provisional renewal of licences," when the question of the renewal of a licence is referred to the compensation authority, the licence itself is to be renewed, though only provisionally, by the licensing justices, and if the renewal is refused by the compensation authority and compensation in consequence becomes payable the licensing justices must at the next general annual licensing meeting, if the compensation money has not been paid and is not likely to be paid before the next 5th of April, grant a further provisional renewal of the licence. That, however, is subject to the conditions being fulfilled which entitle the licensee to a renewal of the licence. If the contention of the applicants is correct, the licensing justices must grant a further provisional renewal of the licence, even though the licensee may have grossly misconducted the business since the provisional renewal was first granted. Rule 43 would not have used the words "on a proper application being made," and thus have required the licensee to go through the formality of applying for a further provisional renewal, if there was an absolute right to the renewal; the rules would have provided for a provisional renewal being granted once for all, when the question of renewal was referred to quarter sessions, until the compensation money was paid. The object

(1) [1906] 2 K. B. 886.

of a provisional renewal of the licence is to prevent the licensee from suffering loss before the compensation money is paid, but he is not relieved from the ordinary consequences attaching to the holder of a licence; and if the licensee has been guilty, for instance, of one of the offences specified in s. 13 and the following sections of the Licensing Act, 1872, the licensing justices can refuse upon that ground to grant a further provisional renewal of the licence. So too if the licensee, in consequence of the premises not being of sufficient annual value, is not a person who ought to hold a licence in respect of those premises, the licensing justices can refuse a further provisional renewal. The word "licence" in s. 15 of the Act of 1872 must include a licence provisionally renewed, and the same meaning must be given to the word in s. 46. It is not contended that the refusal in 1910 to grant a further provisional renewal deprives the persons interested in the licensed premises of their right to compensation, if the Court decides that they have such a right, for the refusal by the compensation authority in 1909 to renew the licence. In *Leeds Corporation* v. *Ryder* (1) the House of Lords did not say that the licensing justices might not have refused the provisional renewal of the licences; they only held that, as the justices had honestly in the exercise of their discretion granted the renewals, there was nothing illegal in what they had done. The licensing justices were therefore entitled to refuse the provisional renewal upon the ground that the premises were not of the annual value of 15*l.* [They also referred to *Reg.* v. *Pilgrim.* (2)]

Avory, K.C., and *Disturnal*, in support of the rule. The question of the renewal of the licence having been referred by the licensing justices to quarter sessions, and the quarter sessions having refused the renewal, everything which follows upon that is merely machinery to enable the business to be carried on upon the premises until the compensation is assessed. Rules 41—43 of the Licensing Rules form a code for attaining that result, and the provisional renewal of the licence is not the renewal of the licence in the ordinary sense for twelve months,

(1) [1907] A. C. 420. (2) (1870) L. R. 6 Q. B. 89.

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but is merely an authority to sell intoxicating liquors on the premises until seven days after the compensation money has been paid: *Malkin* v. *The King.* (1) The provisions of rr. 41—43 are analogous to the provisions of s. 53 of the Licensing Act, 1872, which provides for the grant of a permit to carry on the business pending an appeal to quarter sessions against the refusal of the licensing justices to renew a licence. It would be absurd, for instance, to require the licensee to spend money on repairs to the premises as a condition of granting him a further provisional renewal when the renewal of the licence had already been refused, and the compensation money might be assessed and paid at any moment. Rule 43 therefore provides that the licensing justices at the next general annual licensing meeting, if the compensation money has not been paid and is not likely to be paid before April 5 following, "shall, on a proper application being made for the purpose at that meeting, grant a further provisional renewal of the licence." The licensing justices accordingly at the general annual licensing meeting in February, 1910, had no power to inquire into the annual value of the premises, but were bound to grant a further provisional renewal of the licence, and the rule for a mandamus should be made absolute.

LORD ALVERSTONE C.J. In my opinion these cases do not present any real difficulty when the sections of the Licensing Act, 1904, and the rules made thereunder are carefully considered. The Act, it must be remembered, merely lays down general rules relating to the power to refuse the renewal of licences upon the ground that they are not required for the needs of the district, leaving the details, when once the renewal has been refused, as to the payment of the compensation and the temporary renewal of the licence until compensation has been paid to be worked out by rules subsequently made.

The first of the two rules which have been argued before us is a rule for a mandamus to the compensation authority for the county borough of Walsall to send notice to the Commissioners

(1) [1906] 2 K. B. 886, at p. 894.

of Inland Revenue that the compensation money payable in respect of the Tanners Arms beer-house remained to be determined otherwise than by means of an agreement approved by the compensation authority, together with a statement of the names and addresses of the persons entitled to compensation, as required by r. 31 of the Licensing Rules, 1904. The case put forward on behalf of the compensation authority in the affidavits is that when they came to deal with the question as to the amount of compensation payable in respect of the refusal to renew the licence of the beer-house it was brought to their notice by the particulars in the claim for compensation and by the evidence of a surveyor who was called on behalf of the persons claiming compensation that the premises were of less annual value than 15*l.*; that thereupon, considering that the evidence before them shewed that the premises were not of the requisite statutory value, and that in consequence the licence was null and void, they ordered the question of compensation to stand over until the renewal authority had an opportunity of ascertaining the annual value of the premises. This in effect was a refusal either to approve the amount of compensation money agreed upon between the persons entitled to compensation or to send the matter to the Commissioners of Inland Revenue for the purpose of having the compensation assessed. In order to see whether the compensation authority were right in the course they took, it is necessary to ascertain what are the powers and duties of the renewal authority and of the compensation authority respectively under the provisions of the Licensing Act, 1904, and the rules. Under the provisions of s. 1, combined with s. 9, sub-s. 3, of the Act, the question whether the renewal of a beer licence of this kind shall be refused upon the ground that the premises are not of the annual value required by statute has not been taken away from the renewal authority—that is to say, the licensing justices—and transferred to quarter sessions. That is a question which is still left to the renewal authority, and it is for them to consider and to deal with it upon proper notice of objection being given. It is not unimportant to remember that when notice was served on the tenant of the Tanners Arms in January, 1909, stating that objection would be taken at the general

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annual licensing meeting to the renewal of her licence upon the ground that it was not required for the needs of the district, the ground that the premises were not of the requisite value was struck out. If notice had then been served that objection would be taken to the renewal of the licence upon the ground that the premises were of less than the requisite value, and if that could have been proved, the renewal authority would have refused the renewal. Therefore when the question of the renewal of the licence was referred to the compensation authority there was no issue as to the value of the premises. The renewal authority have no power to refuse the renewal of a licence upon the ground that it is not required. The compensation authority alone have jurisdiction under s. 1 of the Act, upon a reference of the matter to them by the renewal authority, to refuse the renewal upon that ground. Upon the matter being so referred the compensation authority are by sub-s. 2 to consider the report of the renewal authority, and may, after giving certain persons an opportunity of being heard, refuse the renewal of the licence, subject to the payment of compensation. If, therefore, the compensation authority come to the conclusion that the licence is not required they may refuse to grant the renewal, and if they do so the status of the licence as a licence which has been refused and the right of the licensee to compensation are then finally determined. The licence in the present case was refused, and the persons interested in the licensed premises claimed compensation. When the claim came before the compensation authority, a surveyor who was called on behalf of the claimants stated that the annual value of the premises if unlicensed was 10*l.* 12*s.* In these circumstances, there being no other evidence of value, the compensation authority considered that they were justified in refusing, and indeed were bound to refuse, to send the necessary notice and statement to the Commissioners of Inland Revenue for the purpose of having the amount of compensation money assessed. It seems to me to be clear that the compensation authority had no right to deal with that question and to determine that point. I express no opinion as to what may be the jurisdiction of the Commissioners of Inland Revenue when the matter comes before them. Whatever may be their powers, I do

not think that it could have been intended to give indirectly to the compensation authority jurisdiction to deal with an issue which the Legislature has expressly conferred upon the licensing justices. Therefore, taking the facts as stated in the affidavits filed on behalf of the compensation authority, it seems to me that the latter exceeded their jurisdiction in entering upon the question of value. The question of the renewal of the licence having been referred to them by the licensing justices, and the compensation authority having refused the renewal, the amount of compensation money must, in default of agreement approved by the compensation authority, be determined by the Commissioners of Inland Revenue after the notice and statement required by r. 31 have been sent to them by the compensation authority. The rule, therefore, for a mandamus commanding the compensation authority to send the notice and statement to the Commissioners must be made absolute.

The second rule raises a different point. In February, 1909, when the question of the renewal of the licence was referred to quarter sessions, the licensing justices granted a provisional renewal of the licence, and at the general annual licensing meeting in February, 1910, inasmuch as the compensation money had not then been paid and was not likely to be paid before April 5, an application was made to the licensing justices for a grant of a further provisional renewal of the licence. A notice of objection to the grant of a further provisional renewal was served upon the licensee, and the licensing justices inquired into the annual value of the premises both in February, 1909, and in February, 1910, and came to the conclusion that the premises were at both those dates under the annual value required by the statute and refused to grant a further renewal. Counsel who shewed cause against the rule for a mandamus did not argue before us the question whether the licensing justices in 1910 were entitled to inquire into the annual value of the premises in February, 1909, but they contended that the licensing justices were entitled in February, 1910, upon a proper notice of objection being given, to inquire into the annual value of the premises at that date, and that if it were proved before them that the premises did not fulfil the condition as to value

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required by the statute—a condition which, they said, must be fulfilled if the licence was not to be null and void—a further provisional renewal of the licence could not be granted. The basis of that contention is that the application for the further provisional renewal is made subject to all the conditions applicable to an application for the renewal of an ordinary licence. In my opinion that is not so. When once it is realized that, as soon as the renewal of a licence is refused upon the ground that it is not required, all subsequent steps are merely machinery for the purpose of enabling the amount of the compensation to be assessed and paid without causing injustice to any one interested in the premises by reason of the delay which must ensue during the process of working out the compensation, it will be seen that the contention cannot be correct. When the question of the renewal of a licence is referred to the compensation authority, the licensing justices must grant a provisional renewal under r. 41 of the Licensing Rules, 1904; and by r. 42, if the compensation authority refuse the renewal, the licence is to cease to have effect as from the expiration of the seventh day after the date fixed for the payment of the compensation money. By r. 43, "where compensation becomes payable in the case of a licence provisionally renewed, and it appears to the renewal authority at the next general annual licensing meeting after the licence has been provisionally renewed that the compensation money has not been paid and is not likely to be paid before the next fifth day of April, they shall, on a proper application being made for the purpose at that meeting, grant a further provisional renewal of the licence in accordance with the foregoing rules." A provisional renewal of the licence is not the same as an ordinary renewal; it authorizes the licensee to carry on the business until the expiration of the seventh day after the date fixed for payment of the compensation money. It is said that, if we hold that a further provisional renewal of the licence must be granted, the licensee would be entitled to a further provisional renewal though he had committed an offence against the Licensing Acts, which would entitle the licensing justices to refuse the renewal of an ordinary licence. I do not think that that is the effect of our judgment. But even if it were, it is extremely

improbable that a licensee would commit such an offence, inasmuch as if he did he would render himself liable to a penalty under the provisions of the Licensing Act, 1872, which deal with these offences. But, to my mind, that is not the necessary consequence of our decision. If, as I think, the renewal authority can refuse to grant a further provisional renewal if the licensee has been guilty of some misconduct in the carrying on of the business since the preceding general annual licensing meeting, it is not inconsistent with that to say that they are not entitled to refuse to grant a further provisional renewal of the licence merely because the annual value of the premises is then less than the value required by the Act. It would be a hardship upon the licensee to compel him to spend money upon the premises for the sole purpose of maintaining their annual value at the required amount when the licence is for all practical purposes at an end. The licensing justices were therefore wrong in entertaining the question of the value of the premises and in refusing to grant a further provisional renewal of the licence under r. 43 so as to allow the business to be carried on upon the premises until the compensation is assessed, and the rule must therefore be made absolute.

The result is that both these rules will be made absolute.

BRAY J. I am of the same opinion. In the first of these two cases the applicants have obtained a rule nisi for a mandamus to the compensation authority for the county borough of Walsall to send notice to the Commissioners of Inland Revenue that the compensation money payable in respect of the Tanners Arms beer-house remains to be determined otherwise than by agreement approved by the compensation authority, together with a statement of the names and addresses of the persons entitled to compensation. That rule is based upon r. 31 of the Licensing Rules, 1904, which provides that "if the amount of compensation money remains to be determined otherwise than by means of an agreement approved by the compensation authority, the compensation authority shall send a notice of the fact to the Commissioners of Inland Revenue, accompanied by a statement of the names and addresses of the persons entitled to compensation."

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In the present case the amount of the compensation money was not fixed by an agreement approved by the compensation authority, and consequently the latter body were required to send the notice and statement to the Commissioners of Inland Revenue. They refused to do so upon the ground that they had become aware at the supplemental meeting which was held to consider the claims for compensation that the premises in question were of less annual value than 15*l.*, as required by s. 1 of the Beerhouse Act, 1840. That is a ground upon which the licensing justices at the general annual licensing meeting might have refused to renew the licence, and the question which we have to consider is whether it is a ground upon which the compensation authority may refuse to send the notice and statement to the Commissioners of Inland Revenue. In my opinion it is not. When a licensed person desires to apply for a renewal of his licence, notice of intention to oppose the renewal may be given to him on behalf of the licensing justices or of any other objector, stating as a ground of objection that the premises are not of the requisite value, and if notice of objection stating that ground is given the licensing justices have jurisdiction to entertain it. In the present case the licence-holder applied for a renewal of her licence at the general annual licensing meeting in 1909, and notice of objection was served upon her, stating as the ground of objection that the licence was not required for the needs of the district. No ground of objection that the house was not of the requisite value was stated. The sole ground of objection being that the licence was not required, the licensing justices considered that ground of objection and no other, and referred the matter to the compensation authority with their report thereon, under s. 1 of the Licensing Act, 1904, granting a provisional renewal of the licence as required by r. 41 of the Licensing Rules, 1904. The compensation authority, having at their preliminary meeting decided to proceed upon the report of the licensing justices, had at their principal meeting to consider whether they would refuse the renewal of the licence. It may be that the compensation authority may decline to act upon the report upon the ground that the annual value of the premises is not sufficient, and that

the renewal of the licence will in all probability be refused upon that ground at the next general annual licensing meeting. I do not express any opinion whether that is so or not. But in this case the compensation authority decided to act upon the report and refused the renewal of the licence, and thereupon compensation became payable to the persons interested in the licensed premises. Those persons agreed upon the amount of compensation, and upon the matter coming before the compensation authority for their approval at the supplemental meeting, the latter refused to approve the amount so agreed upon, and also refused to send the notice and statement required by r. 31 to the Commissioners of Inland Revenue upon the ground that it had been brought to their notice that the annual value of the premises if not licensed was less than 15*l*. In my opinion they were not entitled to refuse to send the notice and statement to the Commissioners. Their duty was to determine whether they would give their approval to the sum agreed upon by the parties as the compensation money, and if they refused to give their approval, their duty then was to send the notice and statement to the Commissioners of Inland Revenue. They were asked to take that course and they did not do so, and the rule for a mandamus must be made absolute. It is not necessary to say what the Commissioners of Inland Revenue may do when they come to consider the question of the amount of compensation. It is not necessary to say whether they have jurisdiction to consider the question of the annual value of the premises.

The second rule is for a mandamus directed to the licensing justices for the county borough of Walsall to proceed to hear and determine the application for the renewal of the provisional licence. The licensing justices at the general annual licensing meeting in 1910 entertained the objection that the premises were not of sufficient annual value, and they came to the conclusion that the premises were not of sufficient annual value, and refused to grant a further provisional renewal of the licence. The question is whether they had any jurisdiction to do so. Under r. 41 of the Licensing Rules, 1904, if the licensing justices refer the question of the renewal of a licence to the

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compensation authority, they shall grant a provisional renewal of the licence. As soon as they decided to refer the question of the renewal of the licence to the compensation authority the jurisdiction which they had to consider, upon a proper notice of objection, the question of the value of the premises was gone. Having referred the question of the renewal of the licence to the compensation authority, the rule says that they "shall grant" a provisional renewal. By r. 42, if the compensation authority refuse the renewal, the licence which is provisionally renewed shall cease to have effect as from the expiration of the seventh day after the date fixed for payment of the compensation money. Then by r. 43, "where compensation becomes payable in the case of a licence provisionally renewed, and it appears to the renewal authority"—that is, the licensing justices—"at the next general annual licensing meeting after the licence has been provisionally renewed that the compensation money has not been paid and is not likely to be paid before the next fifth day of April, they shall, on a proper application being made for the purpose at that meeting, grant a further provisional renewal of the licence in accordance with the foregoing rules." It is to be observed that what the licensing justices are required to do is merely to extend for a limited period the provisional licence which has been already granted under r. 41. Naturally one would assume that they would be bound to do it, just as they were bound originally to grant the provisional renewal. Rule 43 imposes no conditions upon the right to the further provisional renewal except that there must be a proper application made for the purpose at the general annual licensing meeting. It is said that those words introduce all the elements which the licensing justices may take into consideration when deciding whether to renew an ordinary licence. To my mind they have no such effect. I do not wish to be understood as expressing any opinion as to whether the licensing justices can or cannot consider the question of the applicant being a proper person to hold a licence. However that may be, I do not think that under those words the question of the value of the premises can be inquired into. Whatever may have been the opinion of the licensing justices as to the value of the premises, they were bound to grant the further

provisional renewal of the licence. I think that this rule also should be made absolute.

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PICKFORD J. I agree.

Rules absolute.

Solicitors for prosecutors: *Rubinstein, Myers & Co., for S. A. Newman, Walsall.*

Solicitors for respondents: *Robinson & Bradley, for C. & S. Loxton, Walsall.*

W. F. B.

[IN THE COURT OF APPEAL.]

C. A.

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March 2, 10.

BOALER *v.* POWER AND OTHERS.

Bankruptcy—Petitioning Creditor's Debt—Judgment—Action by Bankrupt to set aside Judgment on Ground of Fraud—Jurisdiction.

Where a person who has been adjudicated a bankrupt in consequence of his failure to comply with a bankruptcy notice to pay a judgment debt alleges that the petitioning creditor's judgment was obtained by fraud, he may apply to the Court in bankruptcy to be allowed to contest the validity of the judgment. He cannot, however, while the adjudication remains in force, bring an action to set aside the judgment on the ground that it was obtained by fraud, and the High Court has no jurisdiction to entertain such an action.

APPEAL of the plaintiff from an order of A. T. Lawrence J. at chambers affirming an order of a Master dismissing the action.

During the past three years there had been considerable litigation between the parties, which is summarized in the following statement of facts.

On April 16, 1907, the plaintiff, Bernard Boaler, issued a writ in the Chancery Division against John Esson & Sons, Limited, and R. C. Power, in which he claimed a declaration that he was entitled to be registered as the holder of 800 ordinary shares of 1*l.* each in John Esson & Sons, Limited.

On July 20, 1907, the plaintiff, Bernard Boaler, issued another writ in the Chancery Division, the defendants being E. K. Howes, W. Howard, W. Phelps & Sons, and John Esson & Sons, Limited.

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In this action the plaintiff asked for an order declaring an extraordinary resolution for the voluntary winding-up of John Esson & Sons, Limited, and for the appointment of Howes as liquidator to be void, and another extraordinary resolution for voluntary winding-up and for the appointment of the plaintiff as liquidator to be effective; also for an order directing Howes to deliver up to the plaintiff the share register, books, and documents of the company in his possession, and for an account of the receipts of Howes since his appointment as liquidator. In this action the plaintiff sued as a shareholder of John Esson & Sons, Limited, on behalf of himself and of all the other shareholders (except three, whose names were given), and also sued as liquidator of John Esson & Sons, Limited.

On April 30, 1909, both actions were tried before Joyce J. and were dismissed with costs. An appeal to the Court of Appeal in the earlier of the two actions was on July 19, 1909, likewise dismissed with costs.

On July 27, 1909, the writ in the present action in the King's Bench Division was issued, the defendants being Power, Howes, Messrs. Steadman, Van Praagh & Gaylor, and John Esson & Sons, Limited; by the indorsement on the writ the plaintiff claimed to have the two orders of Joyce J. of April 30, 1909, dismissing the two actions in the Chancery Division, and also the order of the Court of Appeal of July 19, 1909, set aside on the ground of fraud; damages were also claimed against the defendants other than the company. A statement of claim and defence were delivered in November, but they require no detailed notice.

On August 4, 1909, a petition in bankruptcy was presented against the plaintiff, grounded upon the non-payment by him of the costs of one of the Chancery actions; on November 11 a receiving order was made, and on December 21 the plaintiff was adjudicated a bankrupt. On January 4, 1910, the official receiver, who was trustee in the bankruptcy, declined to take any steps in the present action. An application was then made by the defendants that the action be dismissed, as the trustee had refused to proceed with it, and on January 20, 1910, an order was made by Master Macdonell dismissing the action; this

decision was affirmed on January 25 by A. T. Lawrence J., who gave the plaintiff leave to appeal. On February 14 the Court of Appeal gave leave to the plaintiff to appeal on his own behalf in forma pauperis.

The Plaintiff in person. There was no jurisdiction to dismiss this action, for the cause of action did not pass to the trustee in bankruptcy. An action to set aside a judgment on the ground that it has been obtained by fraud is a well-recognized form of action: *Flower* v. *Lloyd* (1); *Wyatt* v. *Palmer* (2); it is an action to recover damages for a tort, the immediate result of which is to cause injury to the personal feelings of the judgment debtor and (in the present case) to alter his status, and it is immaterial that in consequence of the tort there has also been injury to his estate; the cause of action survives in him notwithstanding the bankruptcy: Williams on Bankruptcy, 9th ed., p. 225. In any event such an action ought not, in the absence of very special circumstances, to be dismissed summarily: *Wyatt* v. *Palmer*. (2) Where there has been substantial damage both to the property and person of a bankrupt, the right of action may be split, and the bankrupt may sue on the cause of action which is personal to himself: *Beckham* v. *Drake* (3); Baldwin on Bankruptcy, 9th ed., p. 341.

Arthur Sims, for the defendants. The alleged cause of action passed to the trustee in bankruptcy, and remains vested in him unless the adjudication is set aside; until that is done, there is no jurisdiction in the King's Bench or Chancery Divisions to entertain such an action as the present, with which the trustee refuses to proceed.

March 10. The written judgment of the COURT (Farwell and Kennedy L.JJ.) was read by

FARWELL L.J. On July 27, 1909, the appellant commenced an action to have an order made in the Chancery Division on April 30, 1909, an order made in the Court of Appeal on July 19,

(1) (1877) 6 Ch. D. 297. (2) [1899] 2 Q. B. 106.
(3) (1849) 2 H. L. C. 579, at p. 629.

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1909, and an order made in the Chancery Division on April 30, 1909, all set aside on the ground of fraud. On August 4, 1909, a petition in bankruptcy was presented against the appellant, and on December 21, 1909, he was duly adjudicated a bankrupt. The official receiver, who is trustee in the bankruptcy, has declined to proceed with the action, and the defendants applied on January 13, 1910, that the actions be dismissed, and the Master and the judge have acceded to the application. The bankrupt has now appealed to this Court against this order. He has filed no affidavit, but the case suggested by him (and which, as he is appearing in person in forma pauperis, we desired to consider) is this. He states that one of his claims was to certain shares and to have the register of the defendant company rectified by inserting his name therein as the holder of such shares. This is property which, if recovered, would belong to his trustee in bankruptcy for the benefit of his creditors; there is no question of after-acquired property or his personal earnings; it is clear that he has no locus standi in respect of this.

His other point was that he claimed as liquidator in one of the other actions certain books of the company: his action was dismissed with costs, and those taxed costs formed the judgment debt on which he was adjudged bankrupt: he does not now claim those books or appeal in respect of any part of this judgment except the order against him to pay costs; but he desires to contest on an allegation of fraud the judgment which was the foundation of the adjudication in bankruptcy against him on the ground that he has lost his status by reason of that judgment. I am of opinion that this contention is untenable. It is open to the Court in bankruptcy, if it thinks fit, to allow the debtor to contest in the Bankruptcy Court the validity of the petitioning creditor's judgment on the ground of fraud, collusion, or for any other sufficient reason: *In re Flatau*. (1) But this is the only way in which the bankrupt can contest it: the adjudication, while it stands, is conclusively binding on him: he cannot contest it in any other Court on the ground of fraud or on any other ground. The right to continue these three actions is a chose in action vested in the trustee, and the bankrupt has no locus standi:

(1) (1888) 22 Q. B. D. 83.

see *Motion* v. *Moojen* (1); *Rochfort* v. *Battersby* (2); *Metropolitan Bank* v. *Pooley*. (3) This appeal must be dismissed, but, as the appellant sues in forma pauperis, without costs.

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Appeal dismissed.

Solicitors for respondents: *Steadman, Van Praagh & Gaylor.*

W. J. B.

[IN THE COURT OF APPEAL.]

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STAFFORDSHIRE FINANCIAL COMPANY *v.* VALENTINE.

Money-lender—Registration—New Address—Places at which Business carried on—Particulars to be inserted in Form of Application — Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51), *ss.* 2, 3.

A registered money-lender, carrying on business at a registered address, who desires to be registered in respect of another and additional address, must in the form of application in respect of the latter address insert the name of the registered address at which he is already carrying on business as well as the address in respect of which he is applying for registration.

APPEAL of the defendant from a judgment of Darling J. after trial with a special jury.

The action was brought upon a bill of exchange for 300*l.* accepted by the defendant. The plaintiffs were a limited company carrying on business as money-lenders at Walsall; they had for some years been registered under the Money-lenders Act, 1900, as carrying on their business at The Bridge, Walsall, which was prior to February 8, 1908, their only registered address. About that date they determined to register 102, Jermyn Street, London, as a place where they carried on their business as money-lenders, and on that day they forwarded to the Commissioners of Inland Revenue an application for registration of 102, Jermyn Street upon one of the forms prescribed for that purpose. In the space in that form for the "names of places where the business is

(1) (1872) L. R. 14 Eq. 202. (2) (1849) 2 H. L. C. 388.
(3) (1885) 10 App. Cas. 210.

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carried on" the plaintiffs inserted 102, Jermyn Street; they did not insert their registered address at Walsall. This form was returned to the plaintiffs by the Inland Revenue authorities three or four days afterwards with a letter pointing out the omission of the Walsall address, and on February 15 it was again sent in by the plaintiffs amended by the insertion of Walsall as a place at which they carried on business. The actual entry of the registration under the plaintiffs' application was made by the authorities on February 17. Meanwhile, on February 12, the money-lending transaction between the plaintiffs and the defendant had been concluded at 102, Jermyn Street, where the bill of exchange now sued upon was handed over to the plaintiffs' manager. It is unnecessary to set out in detail the particulars of the transaction, in which several persons were concerned; it is sufficient to state that the bill of exchange was discounted by the plaintiffs' manager on February 12, 1908, and that the jury found it to be a money-lending transaction. Every part of the transaction was carried out either at 102, Jermyn Street or at the office of one Lester, who carried on business at another address in that street and who was found by the jury to be the plaintiffs' agent, and nothing was done at the plaintiffs' registered place of business at Walsall. It was stated in evidence that the plaintiffs' manager had hired a room at 102, Jermyn Street, which was a hotel, for occasional use, and that the landlord of the hotel had no knowledge of the fact that he intended to register it as a money-lender's office.

The regulations made in 1900 under the powers given by s. 3 of the Money-lenders Act, 1900, by the Inland Revenue Commissioners with the approval of the Treasury, which were in force at the date of the transaction in question but have since been modified, are in the following terms:—

"The whole of the month of November, 1900, shall be allowed for the first registration.

"At the expiration of three years from the date of the preceding registration, for which period registration is, under s. 3 (2.) of the Act, effective, one calendar month shall be allowed for the renewal of the registration.

"Individuals, firms, societies or companies proposing to start

in the business of money-lending for the first time after the commencement of the Act must register before doing so.

"A change of any kind in a firm or unincorporated society or company, or in its place or places of business, as also a change in the place or places of business of any incorporated society, company, or individual, shall entail a fresh registration, which must be made within one calendar month of such change.

"The registration shall be effected either by post or by personal attendance at the prescribed office."

At the trial it was contended for the defendant that, as no part of the transaction had been carried out at the plaintiffs' only registered place of business, which was at Walsall, the transaction was void within the principle of *Gadd* v. *Provincial Union Bank*. (1) The plaintiffs contended that under the regulations registration of the Jermyn Street address had been effected before the completion of the transaction, and that in any event the registration was effected within the period of one month from first carrying on business at the new address within the meaning of the regulations. Darling J. gave judgment for the plaintiffs, and the defendant appealed.

Shearman, K.C. (*G. W. H. Jones* with him), for the defendant. The transaction was not carried out, nor was any part of it carried out, at the plaintiffs' sole registered address. By s. 2, sub-s. 1, of the Money-lenders Act, 1900, "A money-lender as defined by this Act—(*a*) shall register himself as a money-lender in accordance with regulations under this Act, at an office provided for the purpose by the Commissioners of Inland Revenue, under his own or usual trade name, and in no other name, and with the address, or all the addresses if more than one, at which he carries on his business of money-lender; and (*b*) shall carry on the money-lending business in his registered name, and in no other name and under no other description, and at his registered address or addresses, and at no other address"; it is therefore clear on the language of the Act that a money-lender can only trade as such at an address which is registered as being his place, or one of his places, of business. The address 102, Jermyn

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Street was not registered as one of the plaintiffs' places of business at the date of the transaction. If the effect of the regulations is to admit of registration of a place of business within a month after commencing to carry on business at that address, they are ultra vires, as being contrary to the express provisions of the Act itself; indeed, all reference to a period of one month has been omitted in the new regulations of 1910, which, however, do not apply to the present case. Further, the only address contemplated by the Act is a genuine address where the money-lender is engaged in carrying on his business; he must be in actual occupation of the premises, and a mere user of a room for one afternoon in a week is insufficient.

[VAUGHAN WILLIAMS L.J. May not the expression in the regulations "within a month of such change" mean within a month before, and not after, the change has taken place?]

It is not the natural meaning of the words, and such a provision seems to be of no practical advantage.

F. E. Smith, K.C., and *Disturnal*, for the plaintiffs. The address 102, Jermyn Street was a registered address within the meaning of the Act at the date of the transaction. By s. 2, sub-s. 1 (*a*), the money-lender is to "register himself"; registration is therefore the act of the money-lender and not of the Inland Revenue authorities. The regulations permit registration to be effected by post, and therefore the plaintiffs registered themselves on February 8, the day on which they wrote to the Inland Revenue authorities, enclosing the form of application for registration. It was unnecessary in such an application to state all the places at which the business was carried on; the only obligation was to state the proposed address, for the authorities knew that the plaintiffs were already registered in respect of their address at Walsall.

[VAUGHAN WILLIAMS L.J. Whether this was a change of address or an additional address, the form of application appended to the regulations requires the applicant to insert the "names of places where the business is carried on."]

In any event there was a month after the transaction during which registration of the address might be effected, and it is impossible to contend that there was not complete and effective

registration on February 15. The regulations are not inconsistent with the Act and are not ultra vires. By s. 2, sub-s. 1 (*a*), of the Act money-lenders are directed to register themselves "in accordance with regulations under this Act," and this provision is so wide that a money-lender who complies with it and with the regulations is not affected by the narrower language of s. 2, sub-s. 1 (*b*), which requires a money-lender to carry on business only in his registered name and at his registered address. Reading sub-s. 1 (*a*) and sub-s. 1 (*b*) together, a money-lender carries on business in his registered name and at his registered address if his name and address are registered in accordance with the regulations made under the Act.

[FARWELL L.J. Do you say that at the end of three years a money-lender may carry on his business for a month without being registered?]

Yes; under the regulations he has that time within which to renew his registration.

Shearman, K.C., in reply.

VAUGHAN WILLIAMS L.J. I am of opinion that this appeal should be allowed. I approach the decision of cases under the Money-lenders Act, 1900, with some unwillingness, for I have read many of the decisions under it, and I do not think it unfair to say as a general criticism that some of them would not have been given if the Act had not dealt with the subject of money-lending. A special construction ought not to be placed on the language of a particular statute which would not be placed upon it but for the feeling that the mischief aimed at by the Legislature is very serious. An Act should be construed in accordance with the ordinary meaning of the words used, and I approach the construction of this Act in that spirit. Now s. 2, sub-s. 1 (*a*), runs thus: "A money-lender as defined by this Act shall register himself as a money-lender in accordance with regulations under this Act, at an office provided by the Commissioners of Inland Revenue, under his own or usual trade name, and in no other name, and with the address, or all the addresses if more than one, at which he carries on his business of money-lender." In my opinion the question whether the regulations made by the

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Commissioners of Inland Revenue are ultra vires or not is one which the Act cannot have intended the money-lender to consider and decide for himself. He has to obey s. 2, sub-s. 1, and whether he thinks the regulations are in accordance with the Act or not, he must obey them without regard to any inconsistency which might form the basis of a defence to a civil action or criminal prosecution, if one were instituted against him; if he obeys them, he is not liable to a criminal prosecution under the Act, nor is he debarred from enforcing his rights in a civil action. In the present case, however, I am of opinion that the regulations as issued have not been followed by the plaintiffs. But I wish to say in passing that in dealing with the regulation which says "A change of any kind in a firm or unincorporated society or company, or in its place or places of business, as also a change in the place or places of business of any incorporated society, company, or individual, shall entail a fresh registration, which must be made within one calendar month of such change," it is plain that under the last few words a month further is given to the money-lender than was intended by the Act itself. It has been contended that this regulation is ultra vires; but I do not base my judgment on this ground, and sooner than hold the regulations to be ultra vires I would give to them any construction or interpretation that would make them intra vires. The words "within one calendar month of such change" may be construed as meaning that the change must be made, not within a month after the previous registration has ceased to be effective, but within one calendar month before that date. I understand that it may be very undesirable if the registration of a change takes place months or years before the change is in fact carried out, but it is plain that, if the construction which I have suggested is adopted, there is no difficulty in the present case.

I incline, however, to rest my judgment upon the fact that the regulations have not been properly carried out by the plaintiffs. If we look at the forms attached to the regulations of the Inland Revenue Commissioners we find a space for "Name in which the incorporated company or society carrying on the business of money-lending is to be registered"; this the plaintiffs properly filled up with "Staffordshire Financial Company, Limited."

Then comes "Names of places where the business is carried on," which they filled in simply with the address at 102, Jermyn Street, St. James's, although in fact the plaintiffs had already a place of business at Walsall, in respect of which they were registered as money-lenders. In my opinion the plaintiffs could not properly fill in this part of the form without mentioning the place or places of business in respect of which they were already registered. After sending in on February 8 their application for registration the plaintiffs received a letter from the Inland Revenue authorities pointing out this omission in the form. I assume, without deciding the point, that Darling J. was right in saying that it was intended that the registration should be the act of the money-lender, but if it is his act he must do it correctly and in the proper form, and the plaintiffs ought to have named the place at which they were already registered. It is said that the plaintiffs did not intend to give up one place of business and take another, but even if it were merely an additional address in respect of which they were seeking registration, the particulars of the change ought to have appeared on the face of the form. This appeal, therefore, must be allowed.

Fletcher Moulton L.J. I also am of opinion that the appeal should be allowed. It is necessary to examine the Act, the regulations, and the facts of the case. In the first place the Act speaks of a register, which it, of course, intends to be kept, and registration means the entering of the name and address of the applicant in the register. The application for registration is not the same as registration, and s. 2 means that a money-lender shall not carry on business until he is on the register, because until then he has no registered name or registered address. We next find in s. 2, sub-s. 1 (*a*), that a money-lender is to register himself "in accordance with regulations." That section is absolute; until the money-lender has registered his name and address he is not to carry on a money-lending business; the section, however, gives no powers to the Inland Revenue Commissioners, except such as may flow from the fact that it is evidently intended that they are to provide an office for registration under the Act. Sect. 3 gives power to the Commissioners

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to make regulations as to registration, and the particulars mentioned indicate that they are to be ministerial in character; they relate to the method and form of registration. There is nothing in s. 3 to give to the Commissioners power to make regulations as to the effect of registration; the effect of registration is decided by the Act and not by the Commissioners. It is important to notice that by s. 3, sub-s. 2, one provision as to the effect of registration is that it is to last for three years and no longer; it must therefore be renewed every three years.

I turn now to the regulations, with regard to which I may say generally that, so far as they consist of directions as to how registration is to be effected and as to all ministerial acts, they seem sufficient. But, if they are to be construed as we should construe an Act of Parliament, we find in them statements as to the effect of registration which are wholly beyond the powers of the Commissioners of Inland Revenue. For example, let us take the regulation which says "At the expiration of three years from the date of the preceding registration, for which period registration is, under section 3 (2.) of the Act, effective, one calendar month shall be allowed for a renewal of the registration." If that is to be interpreted as though it were a clause in a statute, it must be read as stating that registration lasts effectively for one calendar month after the three years limited by the Act of Parliament, and that renewal of the registration within that month will have the same effect as if the registration were continuous. That is directly contrary to the provision in the statute which says that registration is to cease to be of any effect at the end of three years; its effect, therefore, cannot be prolonged for a day, although it may be renewed, as the section enacts, from time to time. According to the regulation a money-lender may apply within that period of one month for renewal of his registration, and the renewal will date from the last day of the three years; there would therefore be a period (not longer than one calendar month) during which he might carry on business without having his name or address on the register, for the provisions of s. 3, sub-s. 2, of the Act are practically equivalent to a provision that he ceases to be upon the register at the end of three years in the absence of a renewal

of the registration. It is therefore obvious that the regulations, although they are intended to enable applicants to register and must be obeyed by them, touch upon matters which are beyond the powers of the Commissioners, and that, so far as they do so, they must be disregarded by the Court.

The important regulation in the present case runs thus: "A change of any kind in a firm or unincorporated society or company, or in its place or places of business, as also a change in the place or places of business of any incorporated society, company, or individual, shall entail a fresh registration, which must be made within one calendar month of such change." The respondents were an incorporated society having one registered place of business, and they proposed to add another. I think that the adding of a new address, which with the old one would give the totality of their addresses, comes fairly within the meaning of a change of address. If it is not so, this state of things is not expressly provided for in the regulations, and the money-lender would have to make an application in respect of his additional address as though he were applying to be registered for the first time. The words "within one calendar month of such change" lead us to the effect of registration. Probably they are equivalent in meaning to within one month after the change; if that is their meaning, they are clearly contrary to the statute. If they have the meaning which the statute would seem to suggest they ought to have, and which we ought to give to them if possible, and to which the President inclines, they may be read as equivalent to within one month before the change takes place. But I do not wish to base my judgment upon either interpretation of this regulation, for the result is the same in this case, whichever interpretation be taken.

Upon the facts of the case, it is plain that the form in which the application was made is open to no objection; it was fully within the powers of the Commissioners to make such a form, and it was settled by them in a proper manner. On that form the applicant for registration is to give the name of the place where his business is carried on, and where there are more than one, all the places of business are to be inserted in the form. Supposing that what happened here was equivalent to a

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change in the place of business, the plaintiffs ought to have inserted both their addresses. But on February 8 they made an application in respect only of their new address; this was returned to them, and on February 15 it was sent in again by the plaintiffs amended by the insertion of their address at Walsall, the name of the plaintiff company and both addresses being then properly given. This form, being duly filled up, replaced the previous application, and became itself a first application for registration, which was only made on February 15, after the completion of the money-lending transaction in question. We have, therefore, only to decide what is the consequence of carrying out a money-lending transaction at a place which is not registered and in respect of which no application for registration has at the time been made. I have no doubt whatever as to what the consequence must be; under s. 2 of the Act of 1900 the transaction is clearly invalid.

FARWELL L.J. I agree, and will add but a few words. The Act must be construed in accordance with its plain meaning. The difficulty of the respondents lies in the negative words in s. 2, sub-s. 1 (*b*), by which a money-lender is forbidden to carry on a money-lending business except under a registered name and at a registered address; the registered name and registered address are things which a money-lender must have before he can carry on business at all. When the Act speaks of registration in accordance with regulations under the Act it means regulations duly made under the Act. If there were no such regulations a money-lender could not carry on business at all; if the regulations made were ultra vires the position would be the same as though there were none. I do not think that this position is as hard as it appears at first sight. The objection that under such circumstances a money-lender would render himself liable to a criminal prosecution is met by the requirement of the fiat of the Attorney-General for the institution of criminal proceedings, and it is easy to foresee the answer of the Attorney-General in such a case. In any event such considerations cannot affect our construction of the Act of Parliament.

The respondents in the present case are, I think, in a dilemma.

If the new address in Jermyn Street is an additional one and not a change of address, there is nothing in the regulations to help them, and they have clearly carried on business there before that address was registered. But if a change of address includes carrying on business at an additional address, so that the addition of a new place of business to the existing place or places is a change within the meaning of the statute, then either the regulation must be construed in the same way as the Act of Parliament itself, or else, if it is incapable of such a construction, it is ultra vires. One thing, however, is abundantly clear: no money-lender can carry on business as a money-lender except at a registered address and in his registered name. There cannot be any power in the Commissioners of Inland Revenue to override the express provisions of the statute. In the present case the original application for the registration of the address at Jermyn Street was clearly not made in the proper form; the places where the business is carried on, which the applicant is required to specify on the face of the application, must include both the place where it is being carried on at the moment and also the place where it is intended to carry it on when the application for registration is granted, because, except as being a money-lender who has been carrying on business before, a man who is merely intending to carry on business cannot properly be said to be carrying it on. The original application did not shew all the addresses at which the business was to be carried on, and was therefore bad, and money-lenders must in future be careful to see that their registration under the Act is complete before they run the risk of attempting to trade.

Appeal allowed.

Solicitor for defendant: *J. G. Dalzell.*

Solicitors for plaintiffs: *Smiles & Co., for Duignans & Elliot, Walsall.*

W. J. B.

C. A.
1910
April 13, 14.

[IN THE COURT OF APPEAL.]

CLISSOLD *v.* CRATCHLEY and Another.

Sheriff — Execution Creditor — Wrongful Seizure — Indorsement on Writ of Fi. Fa.—Debt paid before Issue of Writ—Absence of Malice—Trespass.

A solicitor, who had an office in London with a branch office in the country, sued out in London a writ of fi. fa. upon an order for costs made in favour of his client against the plaintiff in the High Court, and indorsed the writ, in accordance with Order XLII., r. 16, of the Rules of the Supreme Court, with a direction to the sheriff to levy the amount of the debt. The debt had in fact been paid at the solicitor's country office, to a clerk having authority to receive it, on the same day as, and about three hours before, the writ of fi. fa. was sued out. Neither the solicitor nor his client knew of the payment of the debt. Execution having been levied on the plaintiff's goods, the solicitor was then informed that the debt had been paid, and he withdrew the execution. In an action against the solicitor and his client on the case to recover damages for improperly levying execution, and in the alternative for trespass, it was found that neither the client nor the solicitor who sued out the writ acted maliciously:—

Held, that the defendants were liable in trespass, though in the absence of malice they were not liable in an action on the case.

Decision of the Divisional Court, [1910] 1 K. B. 374, reversed.

Appeal from the decision of a Divisional Court reversing the decision of the judge of the county court of Gloucestershire holden at Stroud; reported [1910] 1 K. B. 374.

The action was brought to recover damages for improperly levying execution, and alternatively for trespass. The plaintiff was a farmer in Gloucestershire, and the defendants were Mrs. Cratchley, who resided in that county, and H. P. Richards, a solicitor. Litigation had taken place in the Stroud County Court between the plaintiff and the defendant Mrs. Cratchley, in which litigation the defendant Richards acted as Mrs. Cratchley's solicitor. In the course of that litigation an order was made in the Stroud County Court in 1908 appointing a receiver of certain property of Mrs. Cratchley, and directing the receiver to sell the property, which was subject to a mortgage, with the consent of the mortgagees. Thereupon a writ of prohibition was, upon the application of Mrs. Cratchley, obtained in the High Court

upon the ground that the order was ultra vires, and the plaintiff was ordered to pay the costs of the prohibition proceedings. The defendant Richards, who had an office in London, with a branch office at Stroud, acted as Mrs. Cratchley's solicitor in the prohibition proceedings; J. L. Norris, of Stroud, acted as solicitor for the plaintiff, and his agents in London, Messrs. Walker & Rowe, acted for him in the matter of the prohibition proceedings. Mrs. Cratchley's costs of the prohibition proceedings were taxed in the High Court at 27*l.* 12*s.* 4*d.*, and the time for carrying in objections to the taxation expired on December 14. No objections were carried in, and the certificate of the taxing Master was given. On December 15 Richards, who was in London, wrote to Messrs. Walker & Rowe requesting payment of the above-mentioned sum of 27*l.* 12*s.* 4*d.* before 11 A.M. on the next day, December 16. At about noon on December 16 Norris went to Richards's office at Stroud and paid the 27*l.* 12*s.* 4*d.* on behalf of the plaintiff to one Greening, Richards's managing clerk, and Greening gave Norris a receipt for the money, signing it "H. Powell Richards, p.p. B. J. Greening." Greening did not write to Richards, who was in London on that day, to tell him of the receipt of the money. On the same day (December 16) Richards, who was not informed of the above payment until the afternoon of December 17, inquired of Messrs. Walker & Rowe whether a cheque for the amount of the taxed costs had been received, and upon being informed that it had not, he told them that he would wait until 2 P.M., and if the money was not then paid he would issue execution. Richards, having received no further communication from them, took out a writ of fi. fa. at 3.45 P.M. on that day (December 16), and on December 17 the sheriff's officer levied execution on the plaintiff's goods at his farm. Greening was communicated with, and he telegraphed to Richards in London, telling him of the payment, and on the following day Richards telegraphed to the sheriff to withdraw from possession immediately, and this was accordingly done. Richards in his evidence stated that he never gave Greening any authority to receive the money.

The county court judge found as facts that the taxed costs of the prohibition proceedings were paid to and accepted by

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Richards's clerk in Stroud some three hours before the writ of fi. fa. was issued in London, twenty-fours before the levy was made, and forty-eight hours before the sheriff withdrew. He came to the conclusion upon the evidence that there was no sufficient proof that either of the defendants had acted maliciously; that in the special circumstances payment was rightly made at Richards's Stroud office, and that Greening had at least implied authority to receive it and to give a valid receipt for it; and he held that the defendants were liable, and gave judgment for the plaintiff for 15*l.* damages. The defendants appealed, and the Divisional Court (Darling and Phillimore JJ.) held that the defendants were not liable in trespass, nor in the absence of malice were they liable in an action on the case; they accordingly entered judgment for the defendants. The plaintiff appealed.

H. L. Sturges (*S. L. Porter* with him), for the plaintiff. The claim in the present action was in the alternative—first, for damages for improperly levying execution, and, secondly, for damages for trespass. It is admitted that the finding of the county court judge that no malice was proved makes it impossible to maintain an action on the case for improperly levying execution, malice being an essential ingredient of such a cause of action; the defendants are, however, liable in trespass, to maintain which it is not necessary to give evidence of malice. Trespass lies against any person who sues out a writ of execution which is subsequently acted upon, if the writ is itself void: *Parsons* v. *Loyd*. (1) There has always been a distinction between irregular process and process which is merely erroneous. If the writ of execution is regular at the time when it is sued out, and a mistake is made at a later date, the only remedy is by an action on the case, which will not lie in the absence of evidence of malice. But where a person sues out a writ of execution at a time when it could not properly be sued out the process is irregular and the writ is void ab initio; if execution is levied under it, the person who sued it out is a trespasser and an action of trespass lies without proof of malice: *Barker* v. *Braham* (2);

(1) (1772) 3 Wils. 341. (2) (1773) 3 Wils. 368.

Bates v. *Pilling*. (1) The defendants in the present action cannot justify under the writ of fi. fa., for it was not issued until after the judgment debt in respect of which it was issued had been in fact paid; the judgment or order having been satisfied, there was no longer any judgment or order to support the issue of the writ, and its issue could not be justified. There is no case which shews that a writ of execution can properly be issued upon a satisfied judgment. In *Gibson* v. *Chaters* (2), which was relied upon in the Court below, the original writ was properly sued out, for it was issued before the debt was paid, and the alias writ, upon which the plaintiff was arrested, was a copy of the original writ. The person who indorses upon a writ of execution a direction to the sheriff to levy is liable in trespass if he indorses it wrongly and the writ is executed; here the defendant Richards, acting under Order XLII., r. 16, indorsed upon the writ a direction to levy the amount as being really due and payable under the judgment or order, and both he and his client are liable in trespass: *Lee* v. *Rumilly* (3); *Morris* v. *Salberg*. (4) [He also cited *Scheibel* v. *Fairbain* (5); *Page* v. *Wiple* (6); *Jarmain* v. *Hooper* (7); *Brooks* v. *Hodgkinson*. (8)]

W. G. Hawtin, for the defendants. It is admitted that it is not essential to prove malice in an action of trespass, but this is not an action of trespass at all. Trespass does not lie for suing out a writ of execution upon a judgment or order which has not been set aside; it will only lie where there is no proper judgment or order to support a writ of execution, in which case the writ is irregular and void ab initio. In the present case the judgment or order upon which the writ of execution was founded was regular, and the issue of a writ of execution upon it cannot form ground for an action of trespass. The case is distinguishable from such cases as *Parsons* v. *Loyd* (9) and *Barker* v. *Braham* (10), where there was no right to issue the writ at all. *Bates* v. *Pilling* (1) is a very different case upon the facts; there the

(1) (1826) 6 B. & C. 38.
(2) (1800) 2 Bos. & P. 129.
(3) (1891) 7 Times L. R. 303.
(4) (1889) 22 Q. B. D. 614.
(5) (1799) 1 Bos. & P. 388.
(6) (1803) 3 East, 314.
(7) (1843) 6 Man. & G. 827.
(8) (1859) 4 H. & N. 712.
(9) 3 Wils. 341.
(10) 3 Wils. 368.

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solicitor who had received the debt allowed five days to elapse before informing his agent, who had in hand the enforcement of the writ of justicies, that the debt had been paid. Further, the present plaintiff did not pay the money to Richards, who was the proper person to receive it. *Gibson* v. *Chaters* (1) is an authority in favour of the defendants, for in that case the writ of capias was sued out after payment of the debt.

[FLETCHER MOULTON L.J. That was not an action of trespass.]

The judgment or order upon which the writ of fi. fa. was founded was perfectly regular, and as it was not set aside, trespass is not maintainable. It may be that an action on the case would lie under somewhat similar circumstances, but in the absence of any proof of malice, which the county court judge has expressly negatived, it would not be maintainable. [He also cited *Jackson* v. *Burleigh* (2); *Huffer* v. *Allen*. (3)]

Sturges was not called upon to reply.

VAUGHAN WILLIAMS L.J. I am of opinion that this appeal must be allowed, although I do not think that the principles of law upon which I base my judgment are in any way contravened by the judgments delivered in the Divisional Court. When those judgments are read, it is clear that both of them recognize the distinction between an action on the case and an action of trespass; they recognize that in an action on the case for maliciously suing out process the allegation of malice is one of fact which must be proved by the plaintiff, and that, if it is not proved, the action cannot be supported. They further recognize that, if an action for maliciously suing out process is not an action on the case but an action of trespass, malice is in no sense essential to its maintenance. I am not sure how it came to pass that, recognizing these distinctions, the judges in the Divisional Court decided the present case on the basis that this action could not succeed without proof of malice. The plaint in the action shews that there were alternative causes of action alleged: the action was in part for maliciously issuing process, and alternatively for trespass: the county court judge in terms

(1) 2 Bos. & P. 129. (2) (1800) 3 Esp. 34.
(3) (1866) L. R. 2 Ex. 15.

recognized this fact in his judgment, which was delivered as a judgment in an action of trespass. Arriving, as I do, at the conclusion that this was an action of trespass, and that it was totally unnecessary for the plaintiff to give evidence of malice, it is necessary to see whether anything can be relied on as shewing that a judgment in trespass was wrong. I can see nothing at all to warrant such a conclusion. It is suggested that, when execution was issued, the judgment against the plaintiff was still in force, notwithstanding that the total amount of debt and costs ordered by it to be paid by the plaintiff had been in fact paid, and a receipt had been given for it by a person authorized to receive the money and give the receipt. It is said that, notwithstanding that fact, there was a still existing judgment which would support the writ of execution, and which was still in force. But common sense, wholly apart from authority, tells one that, when the total amount has been paid which is ordered by a judgment to be paid, the judgment ought no longer to be of any force or effect. But, as it has been argued that a writ of execution is good so long as the judgment under which the moneys have been paid has not in law been set aside, it is convenient to shew the authority for the proposition that, when the total amount of a judgment debt has been paid, the judgment ceases to be of any avail. In *Tebbutt* v. *Holt* (1) Parke B. said, "The law also is that, if the debt and costs are paid or satisfied, the judgment is at an end." This judgment is at an end. And in Bullen and Leake's Precedents, 3rd ed. at p. 353, I find this statement: "An action will not lie for an arrest on final process upon a subsisting unsatisfied judgment (*Blanchenay* v. *Burt*, (1843) 4 Q. B. 707; *Huffer* v. *Allen*, L. R. 2 Ex. 15; 36 L. J. Ex. 17); but if the party arrested can get the judgment set aside for irregularity or on any other ground, or can shew that the judgment was satisfied by payment or otherwise before the arrest, he may then maintain an action: the arrest in such case would in general support an action of trespass." Under the circumstances it seems unnecessary to add anything. The cases on which reliance has been placed on behalf of the defendants are all instances of actions on the case for maliciously issuing

(1) (1844) 1 Car. & K. 280, at p. 289.

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process; not a single authority has been cited to justify the proposition that a satisfied judgment is nevertheless still an existing judgment for the purpose of issuing a writ of execution. If the judgment was not an existing judgment, it is manifest that the writ of execution issued under it was void ab initio, and that an entry has been made upon the plaintiff's premises under a writ void ab initio. The defendants are consequently liable in an action of trespass.

FLETCHER MOULTON L.J. I am of the same opinion. The acts complained of clearly constituted a trespass, and it was for the defendants to justify their action. The sole defence relied on is that there was an order for payment of costs which was equivalent to a judgment, and that a writ of execution was sued out, under which the defendants acted. The plaintiff replies that (as is now admitted to be the case) prior to the suing out of the writ the order had been obeyed. I am satisfied that in this state of things the order was dead for all purposes, and that the suing out of a writ of execution under an order which had already been obeyed was an act void ab initio and could justify nothing. This is therefore, in my opinion, an undefended action of trespass. The judges in the Divisional Court did not, I think, realize that at the date of the decision of *Gibson* v. *Chaters* (1) the form of an action was of prime importance in the eyes of the Court, nor did they realize how great would be considered the difference between actions for maliciously holding to bail or actions on the case in which malice is alleged, on the one hand, and actions of trespass, on the other. No case, however, was cited either in the Divisional Court or before us which in any way contravenes the proposition that a writ of execution upon a satisfied judgment is null and void.

FARWELL L.J. I am of the same opinion. No writ of execution can lawfully issue on a judgment that has been paid or satisfied before issue of the writ; there is no judgment left on which to base the writ, and the writ is void ab initio, and trespass will lie

(1) 2 Bos. & P. 129.

against the satisfied creditor and his solicitor who have put the sheriff in motion. This principle is so plain and well established that it is necessary to examine the judgments delivered in the Divisional Court in order to see whether the result arrived at was not due to some misapprehension. I think that that was the case, for it is apparent from the judgments that neither of the learned judges would contest the principle itself. Darling J. says (1), "I was at first rather captivated by that argument, and thought that the plaintiff might perhaps maintain an action of trespass, but I have upon further reflection come to the conclusion that, before he can do so, he must distinguish the present case from *Gibson* v. *Chaters*." (2) I think that the learned judge overlooked the fact that that was an action on the case in which malice was alleged, but no evidence of malice was given; the case only decided that malice was of the essence of the plaintiff's right of action in an action on the case. Again, the learned judge says (3), "Therefore, unless Gibson was entitled to maintain an action against Chaters, this action will not lie against the present defendants. It was not suggested in *Gibson* v. *Chaters* (2) that an action of trespass would lie if the action on the case was not maintainable." The last criticism is no doubt true, but it must be remembered that in the year 1800 there was no machinery by which an action on the case could be turned into an action of trespass. I think also that the judgment of Phillimore J. in the Divisional Court shews that he too was under a misapprehension as to the effect of *Gibson* v. *Chaters* (2); he says (4) "If it were trespass, no proof of malice would be necessary"; but the present case is trespass, and therefore the plaintiff is entitled to our judgment.

Appeal allowed.

Solicitors for plaintiff: *Walker & Rowe, for J. Lapage Norris, Stroud.*

Solicitor for defendants: *H. Powell Richards.*

(1) [1910] 1 K. B. at p. 381.
(2) 2 Bos. & P. 129.
(3) [1910] 1 K. B. at p. 382.
(4) [1910] 1 K. B. at p. 383.

W. J. B.

1910
April 22.

FISHER *v.* GREAT WESTERN RAILWAY COMPANY.

Lands Clauses Acts — Arbitration—Costs—Offer by Promoters—Conditional Offer—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 34.

By s. 34 of the Lands Clauses Consolidation Act, 1845, the costs of an arbitration under the Act are to be borne by the promoters of the undertaking in question unless the arbitrators award the same or a less sum than shall have been offered by the promoters, in which case each party is to bear his own costs.

A company were by a private Act incorporating the Lands Clauses Consolidation Act, 1845, empowered to construct a bridge and on completion thereof to divert a public footpath which crossed the plaintiff's land. The company having constructed the bridge diverted the footpath. The plaintiff claimed that his land was injuriously affected; he gave notice that he desired to have the amount of compensation settled by arbitration under the Lands Clauses Consolidation Act, 1845, and appointed an arbitrator. The company then sent to the plaintiff's solicitors a letter to this effect: "The company have made arrangements for the construction of a forty feet road which will put your client's property in direct connection with the new bridge and will more than counterbalance any injurious affection of that property by reason of the closing of the old footpath. The road will be made as soon as practicable, and on the understanding that it will be made we make your client an offer of 50*l.* in settlement of his claim." This offer was refused, and the parties proceeded to arbitration, in which 50*l.* was awarded to the plaintiff as compensation.

Upon a special case stated between the parties in an action by the plaintiff against the company to recover his costs of the arbitration:—

Held, that the offer contained in the above letter was not a good offer within s. 34 of the Lands Clauses Consolidation Act, 1845, in that it was ambiguous and embarrassing.

Special Case stated by agreement between the parties.

An action was commenced on June 19, 1909, in which the plaintiff claimed a sum of 50*l.* due under an award with interest thereon, and also the sum of 111*l.* 19*s.* 7*d.* taxed costs. The parties concurred in stating a special case, in which the following facts appeared:—

In and before the year 1907 an ancient public footpath ran from the borough of Ealing, in the county of Middlesex, through certain building land known as Drayton Park Estate to the town of Hanwell, in the same county, and afforded direct access to the borough of Ealing from the dwelling-houses on the Drayton Park

Estate. This footpath crossed on the level the Northolt and West Ealing and Hanwell loop railways of the defendants.

The whole of the Drayton Park Estate formerly belonged to the plaintiff, but during the nine or ten years before 1907 he had sold several building plots and had himself built certain dwelling-houses thereon.

The defendants obtained powers under the Great Western Railway Act, 1904 (4 Edw. 7, c. cxcvii.), which incorporates the Lands Clauses Acts and other Acts, to construct a bridge forty feet wide over their Northolt and West Ealing loop railway, and from and after the completion and opening of the bridge to stop up and divert the portion of the public footpath which crossed their Northolt and West Ealing and Hanwell loop railways. They subsequently constructed the bridge over their railway at a certain distance to the north of the site of the footpath and also at a certain distance to the north of the northern boundary of the Drayton Park Estate. They thereupon stopped up the footpath and diverted it over the bridge. The footpath thus diverted led immediately into another building estate lying to the north of the Drayton Park Estate.

The plaintiff thereupon claimed that his estate and interest in the Drayton Park Estate were injuriously affected by the stopping up and diversion of the footpath. On January 17, 1908, he served upon the defendants a notice to the effect that, unless they were willing to pay the sum of 769*l.* and to enter into a written agreement for that purpose within twenty-one days after receipt of the notice, he desired to have the amount of compensation settled by arbitration in the manner provided by the Lands Clauses Consolidation Act, 1845.

The defendants neither paid nor entered into any agreement to pay the sum claimed. The parties failed to concur in the appointment of a single arbitrator. The plaintiff accordingly appointed his arbitrator. The defendants asked for and obtained extensions of the time in which to appoint their arbitrator. On June 5, 1908, the plaintiff's solicitors received from the defendants' solicitor the following letter, dated June 4, 1908 :—

"Dear Sirs,—Drayton Park Estate, Hanwell. Fisher and the Company—With reference to this matter, as your client has

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already been informed, the company have made arrangements for the construction of a forty feet road which will put Mr. Fisher's property in direct connection with the new bridge over the railway and, as they are advised, will more than counterbalance any injurious affection of that property by reason of the closing of the old footpath. But in order that my clients' position in the arbitration may be assured, I am instructed to give you formal notice on their behalf that the road above referred to will be made as soon as practicable, and on the understanding that such road will be made, to make your client an offer of 50*l.* in settlement of his claim . . . . "

This offer was refused. The defendants appointed their arbitrator; the arbitrators appointed an umpire, before whom the arbitration took place.

Some time before the hearing of the arbitration the defendants constructed or procured the construction of a carriage road forty feet wide on a strip of land between the road carried over the bridge and another road called Shakespeare Road on the Drayton Park Estate. The road so constructed by the defendants gives access to the roads on the Drayton Park Estate from the road over the bridge.

On November 16, 1908, the umpire published his award, assessing at 50*l.* the compensation payable by the defendants to the plaintiff. The defendants took up the award and paid the umpire's charges. The plaintiff's costs were taxed at 111*l.* 19*s.* 7*d.* These costs he claimed under s. 34 of the Lands Clauses Consolidation Act, 1845. (1)

The defendants contended that the letter of June 4, 1908, was a good offer within that enactment and that, as the umpire had awarded the same sum as had been offered, each party should bear his own costs.

(1) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 34: "All the costs of any such arbitration, and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions."

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The plaintiff contended that the letter was not a good offer within s. 34 of the Act inasmuch as it was conditional and embarrassing; and alternatively that if it was a good offer it was made too late.

The defendants tendered and subsequently paid into Court the amount due from them on the basis that the offer was a good offer and made in time.

The questions for the Court were—

(1.) Whether the defendants by the letter of June 4, 1908, made a good offer within s. 34 of the Lands Clauses Consolidation Act, 1845.

(2.) Whether the offer if good was made in time so as to deprive the plaintiff of his costs of the arbitration.

If the Court should be of opinion in the negative on the said questions or either of them, judgment was to be entered for the plaintiff for the sums claimed in and for the costs of the action.

William Mackenzie, for the plaintiff. The offer contained in the letter of June 4 was not a good offer under s. 34 of the Lands Clauses Consolidation Act, 1845. An offer under that section must be an offer in money plain and simple and unconditional: *Balls* v. *Metropolitan Board of Works*. (1) The offer in the present case is either an offer to pay a sum of money and to construct a road, or else it is an offer of a sum of money conditional upon the construction of the road.

[The argument upon the second question has not been reported, as the Court gave no judgment upon this point.]

Sir A. Cripps, K.C., and *Rhys Williams*, for the defendants. An offer is none the less an offer because it is accompanied by a statement of the reasons for making it. The meaning of the letter of June 4 is that in view of the fact that a new road is about to be made as soon as practicable an offer is made of 50*l.* and no more. If the offer had commenced with a recital of the defendants' intention to construct the road and had concluded with an operative part naming 50*l.* as the amount offered, there could have been no objection to the form in which it was made. Every offer is made on a consideration of surrounding facts

(1) (1866) L. R. 1 Q. B. 337.

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and circumstances; the mere statement of those facts and circumstances does not affect the offer.

PHILLIMORE J. In my opinion the offer contained in the letter of June 4, 1908, was not a good offer within s. 34 of the Lands Clauses Consolidation Act, 1845. An offer may, I suppose, be accompanied by any number of reasons for naming a particular figure and any amount of narrative of fact and statement of argument, and it would be none the less an offer. But there must be no doubt that such statements are statements of reasons, facts, or arguments. If statements of expectation are introduced they must be couched in terms which make it clear that they do not amount to promises or representations that the events which are expected shall take place. The terms of this letter leave it doubtful whether it intends to convey a representation that a certain road will be made or a mere statement of argument and expectation. Persons who use such phrases as "on the understanding" that such and such events shall happen have only themselves to blame if their words appear to others to import a condition into their offer. In my view this letter is ambiguous and embarrassing. It might be taken to convey an offer of 50*l.* coupled with a promise that the road should be made, or again it might contain an offer of 50*l.* on the condition that the road is made. In any case it is not a clear unconditional offer of 50*l.*, and therefore I must answer the first question in the negative.

That makes it unnecessary to answer the second question (1) and I forbear to do so. There must be judgment for the plaintiff.

Judgment for plaintiff.

Solicitors for plaintiff: *F. Duke & Son.*
Solicitor for defendants: *L. B. Page.*

(1) With reference to this point the plaintiff contended that the offer of June 4, even if a good offer, was made too late inasmuch as before that date he had incurred costs which he was liable to pay to his solicitors and to the arbitrator appointed by him.

W. H. G.

[IN THE COURT OF APPEAL.]

C. A.
1910
April 15.

In re HARDY'S CROWN BREWERY, LIMITED, AND ST. PHILIP'S TAVERN, MANCHESTER.

Licensing Acts—Practice—Costs—Refusal to renew Licence—Compensation—Appeal from Decision of Inland Revenue Commissioners—Discretion to order Payment of Costs by Commissioners—Licensing Act, 1904 (4 *Edw.* 7, *c.* 23), *s.* 1; *s.* 2, *sub-ss.* 2, 4—*Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 10, *sub-s.* 3.

Upon a successful appeal from a decision of the Inland Revenue Commissioners fixing the amount of compensation to be paid upon the refusal to renew a licence under the Licensing Act, 1904, s. 1, a judge of the High Court has a discretion to order the Commissioners to pay the appellant's costs; but the mere fact that the appeal has succeeded to a substantial extent is not, per se, a sufficient ground for making such an order.

APPEAL from an order made by Bray J. as to costs as after mentioned.

In this case the compensation authority had refused to renew the licence of a public-house in Manchester known as St. Philip's Tavern, under the Licensing Act, 1904, s. 1. The amount of the compensation which thereupon became payable, not being agreed upon, was determined by the Commissioners of Inland Revenue under s. 2, sub-s. 2, of the Act to be 1500*l.* The owners of the house, Hardy's Crown Brewery, Limited, appealed against the award so made by the Inland Revenue Commissioners by petition to the High Court, and, upon the hearing of the appeal before Bray J., he fixed the amount of the compensation payable at 1770*l.* The petitioners thereupon applied for an order for costs against the Commissioners, and, after argument, the learned judge held that, under s. 2 of the Licensing Act, 1904, he had a discretion to make such an order, and, as the appeal had succeeded to a substantial extent, he ordered the Commissioners to pay the petitioners' costs of the appeal. See *Weekly Notes*, 1910, p. 76.

Sir Rufus Isaacs, *S.-G.* (*Lowenthal* with him), for the Commissioners. The learned judge had no jurisdiction to make an order for costs against the Commissioners. It is provided by

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s. 2, sub-s. 4, of the Licensing Act, 1904, that "any costs incurred by the Commissioners of Inland Revenue on an appeal from their decision to the High Court under this section shall, unless the High Court order those costs to be paid by some party to the appeal other than the Commissioners, be paid out of the amount to be paid as compensation." It is true that by sub-s. 2 of the same section it is provided that the amount of the compensation is to be determined by the Commissioners, "subject to the like appeal to the High Court as on the valuation of an estate for the purpose of estate duty." That sub-section was intended generally to regulate the procedure in case of an appeal under the section, and, for that purpose, it no doubt incorporates the provisions of the Finance Act, 1894, s. 10; but that incorporation must be subject to an exception of any provision that may be inconsistent with the express provisions of the Licensing Act, 1904. It cannot be construed as extending to s. 10, sub-s. 3, of the Finance Act, 1894, which provides that "the costs of the appeal shall be in the discretion of the Court," because that would be inconsistent with sub-s. 4 of s. 2 of the Licensing Act, 1904. There was good reason for making a special provision as to the costs of such an appeal under the Licensing Act, 1904, different from that made by s. 10, sub-s. 3, of the Finance Act, 1894. Under the latter Act the Commissioners are, as representing the Crown, interested in the result of the appeal; and it is only right that, if on an appeal they are unsuccessful, they should be liable to be ordered to pay costs. Under the Licensing Act, 1904, they have no interest in the result of the appeal. In determining the amount of compensation under that Act they are acting as an independent tribunal nominated by the statute. It would be an anomalous result that the Commissioners should, if the appeal is successful, be ordered to pay the appellants' costs, but that their own costs should come out of the compensation money. The object of the Act obviously is that, not having any interest in the subject-matter of appeal, they shall be indemnified against any costs in respect of an appeal from their decision. [He also referred to the Licensing Rules, 1904, r. 33.]

Danckwerts, K.C. (*T. C. P. Gibbons* with him), for Hardy's Crown Brewery, Limited. The contention for the Commissioners

involves the result that, however manifestly inadequate the amount which they have awarded for compensation may be, and however unreasonably and obstinately they may have resisted an appeal from their decision, the appellant would have to pay both his own costs and those of the Commissioners in order to get justice. Under the Judicature Act, 1890, s. 5, it is provided generally that "subject to the Supreme Court of Judicature Acts, and the rules of Court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and to what extent such costs are to be paid." Costs are a matter of procedure, and properly come within the purview of a section dealing with procedure. The words "the like appeal" in s. 2, sub-s. 2, of the Licensing Act, 1904, import that all the incidents of an appeal under s. 10 of the Finance Act, 1894, are to attach to the appeal under the Licensing Act, 1904, including the power of the High Court under s. 10, sub-s. 3, to order payment of the appellant's costs by the Commissioners. Therefore, unless there is some provision in the Licensing Act, 1904, which neutralizes the effect of that provision, the High Court would have that power in the present case. The expression "costs incurred by the Commissioners" in s. 2, sub-s. 4, of the Licensing Act, 1904, means "costs incurred by the Commissioners on their own behalf"; it cannot, fairly construed, include costs of the appellant which they may be ordered to pay.

[VAUGHAN WILLIAMS L.J. Sub-s. 4 appears prima facie to contemplate cases in which the appeal is unsuccessful, and to provide that in such a case, unless the appellant is ordered to pay the Commissioners' costs, they shall come out of the compensation money.]

The effect is that, if the appellant is not in such a case ordered to pay the Commissioners' costs, they will come out of the compensation money, in which case the burden will be shared by all those who are interested in that money. But, whatever may be the

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result of the legislation, "costs incurred by the Commissioners," according to the natural meaning of the words, can only mean costs incurred by the Commissioners on their own behalf.

VAUGHAN WILLIAMS L.J. We think that we should be putting too great a strain upon the word "incurred" if we were to adopt the construction contended for by the Solicitor-General; and, that being so, it appears to us that the learned judge had a discretion in the matter, as contended for by the petitioners, under the Finance Act, 1894, s. 10, as incorporated by the Licensing Act, 1904. But, assuming that to be so, the discretion would be a judicial discretion, and we do not think that in this particular case the learned judge has really exercised the judicial discretion contemplated by the Act, inasmuch as the only reason given by him for ordering the Commissioners to pay the appellants' costs was that the appeal had succeeded to a substantial extent. We do not think that, in the case of respondents who, like the Inland Revenue Commissioners, have no interest in the subject-matter of the litigation, the same test ought to be applied as would be applicable under the Judicature Act, 1890, s. 5, in the case of an ordinary appeal; and, therefore, the mere fact that the appeal has succeeded to a substantial extent does not appear to be of itself a sufficient reason for ordering the Commissioners to pay the appellants' costs. We think, therefore, that, if the Commissioners desire it, the case ought to go back to Bray J. in order that he may exercise his discretion in the matter de novo, having regard to what we have said; but, if the Commissioners prefer to appeal to the House of Lords against our decision that the learned judge had a discretion to order the Commissioners to pay the appellants' costs, then the appeal will be dismissed. We think that the Commissioners should be allowed a period of seven days during which to elect which course they will pursue.

FLETCHER MOULTON L.J. and FARWELL L.J. concurred.

Danckwerts, K.C., for the petitioners, contended that, if the Commissioners elected to appeal to the House of Lords, the petitioners ought to have the costs of the appeal.

VAUGHAN WILLIAMS L.J. We do not think so. I am not prepared, applying what I consider to be the rule of discretion which a judge ought to exercise, to say that the Commissioners have behaved unreasonably or improperly in coming here; and I think that, as they are public officers, we ought not to order them personally to pay costs unless we think they personally have behaved unreasonably. But I am particularly anxious that we should give no decision which would debar a Court in a case in which they think that such officers have behaved very unreasonably from making them personally liable to costs.

The order ultimately drawn up on the appeal was as follows: "It is ordered by the Court that, if within seven days the appellants elect that the said petition be remitted to the Honourable Mr. Justice Bray on the question of costs, the said order be set aside so far as it directs that the costs of the petitioners be taxed and paid to them by the said Commissioners, and that the said petition be remitted to his Lordship for reconsideration and redetermination on the question of costs accordingly, this Court being of opinion that the discretion exercised by his Lordship in directing that the said Commissioners should pay the said petitioners' taxed costs was not the judicial discretion that should have been exercised in this case, and that the fact that the petitioners' appeal was substantially successful is not alone sufficient for ordering the said Commissioners to pay the petitioners' said costs, and it is further ordered that, if the appellants do not so elect as aforesaid, the said appeal be and the same is hereby dismissed, and the Court doth make no order as to the costs of this appeal."

Solicitors for petitioners: *Godden, Son & Holme, for Rylance & Sons, Manchester.*

Solicitor for Commissioners: *Solicitor of Inland Revenue.*

E. L.

1910
May 25.

JONES, Appellant *v.* JONES, Respondent.

Licensing Acts—Bona fide Traveller—Closing Hours—Guest of Bona fide Traveller—Using Licensed Premises for Purpose of obtaining Liquor—Guest unlawfully on Licensed Premises—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 25.

A bona fide traveller invited the appellant, who was not a bona fide traveller, to come with him into certain licensed premises as his guest for the purpose of getting something to drink at a time when the premises were required to be closed. When they went in the bona fide traveller ordered and paid for a glass of whisky for each of them. Upon an information charging the appellant, under s. 25 of the Licensing Act, 1872, with being unlawfully on the licensed premises at a time when the premises were required to be closed:—

Held, without expressing an opinion as to whether a bona fide traveller is entitled under any circumstances to order and pay for intoxicating liquor at licensed premises for consumption by another person as his guest, that, as the appellant went to the inn with the bona fide traveller for the sole purpose of getting intoxicating liquor, though the liquor was to be ordered and paid for by the bona fide traveller, he was unlawfully on the premises and was liable to be convicted under s. 25 of the Act.

Case stated by justices for the county of Merioneth.

At a petty sessional court held at Towyn an information was preferred by the respondent, a sergeant of police, against the appellant for that he, the appellant, on November 7, 1909, was found unlawfully on the premises of one Edward Evans, then licensed for the sale of intoxicating liquors by retail, during part of the period during which the premises were required under the provisions of the Licensing Act, 1874 (37 & 38 Vict. c. 49), and the Sunday Closing (Wales) Act, 1881 (44 & 45 Vict. c. 61), to be closed, to wit, at 12.20 in the morning, the said day being Sunday.

At the hearing the following facts were proved or admitted:—Shortly before 12.20 a.m. on Sunday, November 7, 1909, the appellant and one Vaughton entered the Cefncoch inn (being the licensed premises of Edward Evans) and were both served with a glass of whisky. The appellant and Vaughton arrived there in a motor car belonging to Vaughton, who was a bona fide traveller, as he had slept the previous night at his home at

Arthog, which was distant about seven miles from the Cefncoch inn. The appellant resided within three miles from the inn and had slept there the previous night. Vaughton met him in Towyn, and their respective residences being in the same direction Vaughton invited the appellant to drive with him in his motor car, and on their arrival at the Cefncoch inn Vaughton invited the appellant to come into the inn as his guest and ordered and paid for the whisky, and was bona fide entertaining the appellant as his guest in the belief that he could lawfully do so. At 12.20 A.M. of the same day a police constable entered the inn and there saw the appellant and Vaughton with a partly consumed glass of whisky before each of them and with a bottle of whisky on the table. The constable, who was in plain clothes, said that he was a police constable and that it was not right for the appellant, who lived within a short distance of the inn, to be on the premises at the time, and that he would have to report it. Vaughton replied that it was all right and that the appellant was his guest. The constable subsequently left, and the appellant and Vaughton remained in the inn.

It was contended on behalf of the appellant that he had not under the circumstances committed the offence alleged against him on the ground that, as a matter of law, a bona fide traveller could entertain a guest as long as it was not a mere sham, in the same way as a lodger could, and the cases of *Pine* v. *Barnes* (1), *Cope* v. *Landles* (2), and *Oliver* v. *Loudon* (3) were cited.

The justices decided that a bona fide traveller could not in law entertain any other person at an inn as his guest by paying for any intoxicating liquor supplied to such guest, and that the appellant was therefore unlawfully on the premises at the time in question, and they accordingly convicted him and imposed a fine of 20*s*. and costs.

The question for the opinion of the Court was whether a bona fide traveller can lawfully entertain a person at an inn and pay for intoxicating liquor supplied to such person where otherwise that person would be guilty of an offence for being upon the premises of such inn at the time, and consequently whether

(1) (1887) 20 Q. B. D. 221. (2) (1896) 13 Times L. R. 18.
(3) (1896) 23 R. (Just. Cases) 34.

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under the circumstances the appellant was guilty of the offence alleged against him.

R. V. Bankes, for the appellant. Sect. 25 of the Licensing Act, 1872 (1), under which the appellant was convicted, and s. 10 of the Licensing Act, 1874, which deals with the right of a licensed person to sell intoxicating liquor at any time to bona fide travellers and to persons lodging in his house, place bona fide travellers in the same position as lodgers in the house. A lodger in a licensed house may entertain his friends and for that purpose may order and pay for intoxicating liquors to be consumed by them during closing hours so long as he acts bona fide: *Pine* v. *Barnes*. (2) Bona fide travellers are in the same position in this respect as lodgers: *Oliver* v. *Loudon* (3); Paterson's Licensing Acts, 10th ed., p. 184; 20th ed., p. 520. In both the above cases the licensed person was charged with the offence of unlawfully selling intoxicating liquor or allowing it to be consumed, but if the licensed person cannot be convicted, it is difficult to see how the friend of the bona fide traveller can be convicted of being unlawfully on the premises. The appellant, being the guest of a bona fide traveller, comes within the words of the exception in s. 25 of the Act of 1872, "or that otherwise his presence on such premises was not in contravention of the

(1) 35 & 36 Vict. c. 94, s. 25: "If during any period during which any premises are required under the provisions of this Act to be closed any person is found on such premises, he shall, unless he satisfies the Court that he was an inmate, servant, or a lodger on such premises, or a bona fide traveller, or that otherwise his presence on such premises was not in contravention of the provisions of this Act with respect to the closing of licensed premises, be liable to a penalty not exceeding forty shillings . . . ."

The hours of closing licensed premises are now regulated by s. 3 of the Licensing Act, 1874 (37 & 38 Vict. c. 49); and s. 10 of this Act provides that "nothing in this Act or in the principal Act contained shall preclude a person licensed to sell any intoxicating liquor to be consumed on the premises from selling such liquor at any time to bona fide travellers or to persons lodging in his house . . . . A person for the purposes of this Act and the principal Act shall not be deemed to be a bona fide traveller unless the place where he lodged during the preceding night is at least three miles distant from the place where he demands to be supplied with liquor, such distance to be calculated by the nearest public thoroughfare."

(2) 20 Q. B. D. 221.

(3) 23 R. (Just. Cases) 34.

provisions of this Act." A licensed person can sell intoxicating liquor to a bona fide traveller during closing hours, and he does not commit an offence because the latter orders and pays for the liquor for the purpose of giving it to a friend. (1)

[CHANNELL J. The case of a licensed person may be different from that of a guest of a bona fide traveller. Has the guest any right to be there at all during closing hours for the purpose of having liquor given to him?]

A bona fide traveller can entertain his friends during closing hours so long as he acts bona fide, and if that is so, the friends cannot be considered as being unlawfully on the licensed premises. If a person calls at an inn during closing hours to see a friend of his who is there as a bona fide traveller, and during the course of the visit the latter orders and pays for intoxicating liquor for his friend, no offence is committed. It makes no difference that the bona fide traveller and his friend go to the inn together. The appellant was not unlawfully on the premises, and the conviction was wrong.

R. M. Montgomery, for the respondent. A licensed person may sell intoxicating liquor to a lodger or to a bona fide traveller, and he is not concerned with what the lodger or traveller does with it, provided that the sale is bona fide. That is pointed out by Hawkins J. in *Pine* v. *Barnes* (2) in the case of a lodger, and by Lord M'Laren in *Oliver* v. *Loudon* (3) in the case of a bona fide traveller. But a guest of a bona fide traveller is in a different position. He comes within s. 25 of the Licensing Act, 1872. The appellant can only justify his presence at the inn at the time in question by bringing himself within one of the classes of persons specially excepted from the prohibition in s. 25 of the Act. He was not an inmate, or a servant, or a lodger, or a bona fide traveller. Nor can he bring himself within the words "or that otherwise his presence on such premises was not in contravention of the provisions of this Act with respect to the closing of licensed premises." The closing of licensed premises means the closing with regard to the sale of intoxicating

(1) It was stated that there was an information against the licensee of the inn, which stood over pending the result of this appeal.

(2) 20 Q. B. D. 221.

(3) 23 R. (Just. Cases) 34.

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liquor: *Tassell* v. *Ovenden*. (1) If a person can shew that he is not upon the premises with the object of using them as licensed premises for the purpose of being supplied with intoxicating liquor, as, for instance, that he is a painter or a plumber doing painting or plumbing work, his presence there is not in contravention of the provisions of the Act. The appellant here went into the inn with a friend for the sole purpose of obtaining intoxicating liquor to drink during closing hours, that is, for the purpose of using the premises as licensed premises in order to get something to drink. That is the meaning of the finding of the justices. It is not a case where a person is lawfully on the premises and while there is offered and accepts intoxicating liquor from a bona fide traveller who orders and pays for it. The appellant having gone into the inn for the purpose of getting a drink was unlawfully there, and the conviction was right.

R. V. Bankes in reply. There is nothing in the case to shew that the appellant went into the inn for the purpose of getting intoxicating liquor, even if that would make any difference. The case only states that Vaughton invited the appellant to come into the inn as his guest. The justices were wrong in the principle which they laid down, namely, that a bona fide traveller cannot in law entertain any other person at an inn as his guest.

LORD ALVERSTONE C.J. In this case it is not necessary to express any opinion upon the question whether under any circumstances a bona fide traveller can order and pay for intoxicating liquor at licensed premises during closing hours for consumption by another person who is not a bona fide traveller. I do not propose to deal with that broad question, and I do not desire to be understood as expressing any opinion upon it one way or the other. Nor do I wish to be understood as expressing any opinion as to the position of the licensed person in the matter. I am satisfied that the justices have in effect held that the appellant was not in the circumstances lawfully on the licensed premises inasmuch as he went into the inn for the purpose of getting intoxicating liquor. The question before us

(1) (1877) 2 Q. B. D. 383.

turns upon s. 25 of the Licensing Act, 1872, which enacts that "if, during any period during which any premises are required under the provisions of this Act to be closed any person is found on such premises, he shall, unless he satisfies the Court that he was an inmate, servant, or a lodger on such premises, or a bona fide traveller, or that otherwise his presence on such premises was not in contravention of the provisions of this Act with respect to the closing of licensed premises, be liable to a penalty not exceeding forty shillings." The appellant was on these premises during a part of the period during which they were required to be closed, and it is obvious that he has not brought himself within the exception in the section as being an inmate, or a servant, or a lodger, or a bona fide traveller. It is said, however, that he comes within the last words of the exception, "that otherwise his presence on such premises was not in contravention of the provisions of this Act with respect to the closing of licensed premises." The hours during which licensed premises are required to be closed are specified in s. 3 of the Licensing Act, 1874, and in this particular case during the whole of Sunday under s. 1 of the Sunday Closing (Wales) Act, 1881. I accept the argument of the respondent's counsel that the term "closing" of licensed premises means closing for the purpose of the sale of intoxicating liquor. If the case here had been that the appellant had gone to the inn for the purpose of seeing a friend of his who was there as a bona fide traveller, and afterwards the latter asked him to have something to drink, and ordered and paid for the liquor for him, the main contention put forward by the appellant's counsel would have arisen. But the only construction which I can place upon the finding of the justices is that Vaughton invited the appellant to go into the inn for the sole purpose of having something to drink, because they state that Vaughton met the appellant in Towyn, and their respective residences being in the same direction Vaughton invited the appellant to drive with him in his motor car, and on their arrival at the inn Vaughton invited the appellant to come into the inn as his guest, and ordered and paid for the whisky, and was bona fide entertaining the appellant as his guest in the belief that he could lawfully do so. I understand that to mean that the appellant went into the inn upon the invitation of a

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Lord Alverstone C.J.

bona fide traveller for the purpose of obtaining intoxicating liquor which was to be ordered and paid for by the bona fide traveller. In my opinion the appellant's presence on the premises was in these circumstances in contravention of s. 25 of the Licensing Act, 1872, inasmuch as he was there for the mere purpose of obtaining the liquor under colour of the right of the bona fide traveller to order and pay for intoxicating liquor. This being the ground upon which I base my decision, it does not touch the broader question as to the right of a bona fide traveller when in the inn to entertain a friend, to which I have referred above. The appeal must be dismissed and the conviction affirmed.

CHANNELL and LORD COLERIDGE JJ. agreed.

Appeal dismissed.

Solicitors for appellant: *Philpot, Morrell & Hughes, for A. J. Hughes, Aberystwith.*

Solicitors for respondent: *Gibson & Weldon, for R. Guthrie Jones, Dolgelly.*

W. F. B.

SIMMONDS *v.* THE STOURBRIDGE GLAZED BRICK AND FIRE CLAY COMPANY, LIMITED.

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April 20, 21.

Employer and Workman—Compensation—Injury by Accident—Custom to receive Allowance Coal during Incapacity—Assessment of Compensation under Workmen's Compensation Act—Right to sue Employer for Allowance Coal—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 2 (*b*); *Sched. I., clauses* 1 (*b*), 3.

The plaintiff was employed by the defendants as a miner in their colliery. There was a custom in collieries in the district that a miner was entitled, in addition to his wages, to (1.) a load of allowance coal for every twenty-four turns while in work, and (2.) a load of allowance coal every five weeks during incapacity caused by accident. The plaintiff, having been incapacitated for work by an accident arising out of and in the course of his employment, was awarded a weekly payment during incapacity as compensation under the Workmen's Compensation Act, 1906. In an action to recover the allowance coal for the period since the date of the accident or its value :—

Held, that the right to the allowance coal under the custom formed one of the terms of the plaintiff's contract of employment and was not in the nature of compensation for the injury, and that therefore he was not debarred by s. 1, sub-s. 2 (*b*), of the Workmen's Compensation Act, 1906, from maintaining the action.

Appeal from the county court of Worcestershire holden at Dudley.

The action was brought by a miner, who claimed nine loads of fire coal (called allowance coal) alleged to be due to him between January 6 and October 13, 1909, inclusive, in accordance with the custom of the district, or in the alternative 3*l.* 3*s.* in lieu thereof.

Upon February 19, 1908, the plaintiff, who was then employed as a miner at the defendants' colliery at Blowers Green, Dudley, met with an accident arising out of and in the course of his employment, whereby he was incapacitated for work. On February 29, 1908, the defendants agreed to pay to the plaintiff 1*l.* a week as from the date of the accident during total incapacity or until the same should be ended, diminished, increased, or reduced in accordance with the provisions of the Workmen's Compensation Act, 1906. On December 22, 1908, a memorandum of the above agreement was, pursuant to clause 9

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of Sched. II. to the Workmen's Compensation Act, 1906, recorded in the Dudley County Court. On January 15, 1909, an application was made by the defendants for a review of the weekly sum payable to the plaintiff upon the ground that the plaintiff was not then incapacitated for work, and the county court judge, sitting as arbitrator under the Act, on April 20, 1909, made an award reducing the amount of the weekly compensation to 15*s.*, such reduction to commence from the date of the award and to continue during total or partial incapacity for work or until the same should be ended, diminished, increased, or reduced in accordance with the provisions of the Act. Subsequently the plaintiff brought this action, claiming nine loads of allowance coal (1) or its value, as above stated. The county court judge found upon the evidence called for the plaintiff, no evidence being called for the defendants, that there was a custom in collieries in the Black Country (South Staffordshire and East Worcestershire), where the defendants' colliery was situated, that a collier was entitled in addition to his wages to (1.) a load of fire coal for every twenty-four turns while in work, and (2.) a load of fire coal every five weeks during incapacity caused by accident; and that in some cases the last-mentioned allowance coal or a money payment in lieu thereof had been given in addition to compensation since the passing of the Workmen's Compensation Act, 1906. He held, however, that the object and effect of s. 1, sub-s. 2 (*b*), of the Workmen's Compensation Act, 1906, was to finally settle any claim for compensation for injury by accident, and that the section debarred a workman who took advantage of the Act from making any claim in respect of the accident, except such as was created by the Act, and that such claim was under Sched. I., clause 1 (*b*), restricted to 1*l.* a week. He accordingly nonsuited the plaintiff. The plaintiff appealed.

Simon, K.C. (*Hazel* with him), for the plaintiff. The custom among collieries in the Black Country, as found by the county court judge, amounts to this, that the employment of a miner is

(1) It appeared that the plaintiff received the allowance coal from the defendants down to the beginning of December, 1908, but the defendants' counsel stated that the coal was delivered under a mistake.

upon the terms that he shall receive a money wage, and that in addition to his money wage he shall receive a load of fire coal for every twenty-four turns while he is in work, and if he meets with an accident incapacitating him for work that he shall receive a load of fire coal every five weeks during incapacity. The custom to give allowance coal during incapacity is not limited to the time during which the miner remains in the employment of the colliery owner. The right to the coal lasts as long as the incapacity lasts. The custom is part of the terms of the contract of employment. In ascertaining what are the average weekly earnings of a workman before the accident under Sched. I., clauses 1 (*b*) and 2, to the Workmen's Compensation Act, 1906, not only his money wages but also his right to the allowance coal while in work must be taken into account. Everything to which the workman is entitled by the terms of his employment must be taken into account. The right to the allowance coal must for that purpose be converted into its money equivalent. Having ascertained the average weekly earnings, the county court judge must then fix the amount of the weekly payment as compensation for the injury, which must not exceed 50 per cent. of the average weekly earnings, such weekly payment, however, in no event to exceed 1*l.*; and under clause 3 of Sched. I., in fixing the amount of the weekly payment the judge must have regard to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity. This latter provision refers chiefly to something given by way of compensation since the accident, which must first be deducted from the amount of the weekly payments. In fixing the amount of the weekly payment at 15*s.* the county court judge ought not to have, and must be presumed not to have, included anything in respect of the allowance coal which the plaintiff was entitled to receive during incapacity. The allowance coal during incapacity is not compensation at all. It is due under the contract of employment and falls altogether outside the Act, and if there are any arrears due at the time of the death of the workman his personal representative will be the proper person to sue for them. The county court judge had no power to convert the allowance coal into its money equivalent and to include it in the weekly

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payment awarded as compensation under the Act. In fixing the weekly payment at 15*s.* he must in law have excluded any consideration as to the allowance coal during incapacity, leaving the right to the allowance coal untouched. It is similar to a right which a workman may have under his contract of employment to live rent free in a cottage when incapacitated for work, which would arise out of the contract of employment, and which could not form an element in the compensation awarded under the Workmen's Compensation Act, 1906. Even if the county court judge in fact acted upon a wrong principle, as to which there is no evidence before the Court, an application cannot be made to him to review his award under Sched. I., clause 16, there having been no change in the circumstances since the weekly payment was awarded: *Crossfield & Sons* v. *Tanian.* (1) The judgment of the county court judge was therefore wrong, and the plaintiff is entitled to recover.

Vachell, K.C. (*Joy* with him), for the defendants. For the purposes of this case it must be taken, as found by the county court judge, that the custom alleged by the plaintiff has been proved. Under the custom the allowance coal during incapacity caused by accident is given in part compensation for the injury, and the county court judge must be presumed to have taken this into account, as he was bound to do, when awarding the weekly payment of 15*s.* as compensation. Sect. 1, sub-s. 2 (*b*), of the Workmen's Compensation Act, 1906, preserves any civil liability of the employer where the injury is caused by the personal negligence or wilful act of the employer or of some person for whose act or default he is responsible, but an employer shall not be liable to pay compensation both independently of and also under the Act. Before the injury the plaintiff was entitled to the allowance coal in part payment of his wages; after the injury he was entitled to the allowance coal as part of the compensation for his injury. It being part of the compensation, the plaintiff could not claim compensation both independently of and also under the Act; he was put to his election. He claimed compensation under the Act, and the award of a weekly payment of 15*s.* included all the items which made up the compensation, and therefore included

(1) [1900] 2 Q. B. 629.

the right to the allowance coal. Having so elected, he cannot now turn round and sue the defendants for the allowance coal. Next, if the allowance coal during incapacity is not to be regarded as part compensation for the injury, inasmuch as the right to it before incapacity formed an addition to the plaintiff's wages while he was at work, and therefore increased the amount of his average weekly earnings, the right to it during incapacity had also to be taken into account as an addition to the compensation. Under Sched. I., clause 3, in fixing the amount of the weekly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity; and this clause is not limited to a payment, allowance, or benefit which reduces the compensation, but includes an addition thereto in respect of any payment, allowance, or benefit which the workman may be entitled to receive in the future from his employer during incapacity. The county court judge in fixing the amount of the weekly payment at 15*s.* was bound under clause 3 to take that into account; and he must be assumed to have assessed the amount properly, and to have taken into account the right which the plaintiff had to the allowance coal during incapacity and to have included it in the 15*s.* The plaintiff cannot recover it over again. The judgment of the county court judge was therefore right.

Simon, K.C., in reply.

DARLING J. This case raises a question of some little difficulty. When a workman has been injured by an accident arising out of and in the course of his employment and is incapacitated for work, the county court judge, in assessing compensation under the Workmen's Compensation Act, 1906, must, under clauses 1 (*b*) and 2 of Sched. I. to the Act, ascertain what have been the average weekly earnings of the workman, and then the compensation which he can award is a weekly payment during incapacity not exceeding 50 per cent. of the workman's average weekly earnings during the previous twelve months, if he has been so long employed, but if he has not been so long employed, then for any less period during which he has been in the employment of the same employer, such

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weekly payment not to exceed 1*l.* In order to ascertain what those average weekly earnings were the judge ought to take into account not only the money wages of the workman, but also what he was entitled to receive in kind in his employment, so that when he is incapacitated for work by reason of an accident he shall receive as compensation a weekly payment not exceeding one-half of his average weekly earnings ascertained by taking into account the value of everything to which he was entitled. If, for instance, the workman received 1*l.* a week as wages and an allowance for coal or house rent or some such matter while he was in his employment, the county court judge ought to take all those elements into account as making up the weekly earnings. In assessing those weekly earnings he must value what the workman received in kind and convert it into its money equivalent—he cannot compensate in kind—and that sum and the money wages together constitute the workman's weekly earnings. When the judge, having thus ascertained the average weekly earnings, proceeds to make an award of compensation, he is entitled to order a weekly payment of a sum not exceeding one-half of the average weekly earnings so ascertained, provided that the sum does not exceed 1*l.* But it may be that during the incapacity the employer has already paid the workman something either in money or in kind. Clause 3 of Sched. I. says that "in fixing the amount of the weekly payment regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity." To my mind that means that if during the period of his incapacity the workman has not lost all his earnings, but has received some portion of them, whether in money, coal, or house rent, or some such thing, seeing that the employer is not bound to give it to him, the county court judge must take that into consideration, and he ought to assess the value of what the workman has so received and set it off against the amount of the weekly payments which he fixes, and that will form an initial deduction from the compensation. I do not know whether the county court judge here did or did not construe the Act rightly, but he must be taken to have done so, and to have assessed the compensation in the way I have

stated, which, if I am right in my judgment, is the correct way. The maxim Omnia præsumuntur rite esse acta applies. The plaintiff in this action claims nine loads of allowance coal due from January 6 to October 13, 1909, in accordance with the custom of the district, or in the alternative 3*l.* 3*s.* in lieu of the coal. This claim is not in any way based upon clause 3 of Sched. I. to the Act. It is not claimed as something which he was entitled to receive as compensation under the Act. It is claimed by virtue of a custom of the district which is incorporated in his contract of employment. The custom is that as soon as a miner meets with an accident, even though he ceases to be in the service of his employer, he is entitled—it may be during the rest of his life if his incapacity lasts so long—to receive, not indeed as much allowance coal as he had before the accident when he was able to work, but a certain amount of allowance coal, the value of which in this case amounts over the period in question to 3*l.* 3*s.* The coal is due under his contract of employment. In my opinion the plaintiff is entitled, upon proof of the custom, to receive the allowance coal, and, upon the defendants refusing to allow it to him, to maintain this action, because the county court judge in assessing compensation under the Workmen's Compensation Act, 1906, was not entitled to take that into consideration and include it in the weekly sum awarded as compensation under the Act. As I have said, I must assume that the county court judge construed the Act properly and did not take the right to the allowance coal into consideration in fixing the amount of the weekly payment under the Act. The defendants do not appear to have contested at the trial the existence of the custom, because the county court judge says that the plaintiff's evidence proved that in the collieries in the Black Country the custom existed. The defendants did not call evidence to contradict the evidence called for the plaintiff, but were content to leave the evidence as it stood upon the plaintiff's case, and therefore, the plaintiff's evidence being uncontradicted, the county court judge has found that the custom was proved.

With regard to the contention, founded upon s. 1, sub-s. 2 (*b*), of the Act, that the plaintiff cannot maintain this action because the defendants, the employers, are not "liable to pay compensation

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for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act," to my mind the answer to that contention is the one that I have indicated above, namely, that the claim here is not a claim for compensation at all. It is a claim arising out of the custom which the county court judge has found to be proved, and which forms one of the terms of the contract under which the plaintiff was employed by the defendants. Take the case where a workman as one of the terms of his contract of employment was to be entitled to a cottage rent free for the rest of his life. To my mind it is impossible to say that this provision in the Act would prevent him from maintaining an action against his employer who had ejected him because he had recovered compensation under the Act for an injury by accident. I do not think that s. 1, sub-s. 2 (*b*), means that, if the workman has entered into such a contract with his employer which is independent of the service to be rendered and which may endure after the service has been terminated, the recovery of compensation under the Act is a bar to the enforcement of the contract in an action for that purpose. In my opinion the county court judge took a wrong view of the meaning of the Act. The claim here is not a claim for compensation either under the Act or independently of the Act, but arises under a contract between the plaintiff and the defendants. In my opinion, therefore, the appeal should be allowed.

BUCKNILL J. I am of the same opinion. The object of the Workmen's Compensation Act, 1906, is to extend the liability of an employer to his workmen for accidents arising out of and in the course of their employnent, and incidentally for this purpose to take away the defence of common employment, and it preserves the civil liability of the employer where the injury to the workman is caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible. The old common law remedies against the employer still remain open to the workman, and if he is entitled at common law to bring an action instead of proceeding to have compensation assessed under the Workmen's Compensation Act, 1906, he can

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Bucknill J.

still do so, but under the provisions of s. 1, sub-s. 2 (*b*), of the Act he cannot claim compensation under the Act and take proceedings against his employer to recover compensation independently of the Act. The county court judge here nonsuited the plaintiff upon the ground that he had already recovered compensation under the Act and was now claiming compensation independently of the Act, a proceeding which is forbidden by s. 1, sub-s. 2 (*b*), of the Act. In my opinion that is not a right view of this action. The claim in this action is for nine loads of allowance coal alleged to be due to the plaintiff for the period between January 6 and October 13, 1909, or 3*l.* 3*s.* the value thereof. It is proved that in this colliery district a miner is entitled under a custom, which is incorporated as a term in his contract of employment, to receive from his employers, in addition to his wages, a load of fire coal for every twenty-four turns while in work, and a load of fire coal every five weeks during incapacity caused by accident. Therefore while the workman is at work he receives his remuneration partly in a money wage and partly in allowance coal. When the workman is incapacitated by accident he is to receive a certain amount of allowance coal during incapacity. If the employer chooses to contract to supply a workman who is incapacitated by accident with a certain amount of coal he must do so. He may have made a good or a bad bargain, but he cannot escape from his contract. In ascertaining what the workman's average weekly earnings were before the accident the county court judge, sitting as an arbitrator under the Workmen's Compensation Act, 1906, had to add together the money wage and a certain sum for the allowance coal. Having ascertained the average weekly earnings, he had then to fix the amount of the weekly payment which he ought to order to be paid by the employer as compensation. That weekly payment was not to exceed 50 per cent. of the average weekly earnings, nor was it in any event to exceed 1*l.* In fixing 15*s.* as the amount of the weekly payment the judge was not entitled to take the allowance coal during incapacity into account. The original contract to allow the plaintiff so much coal during incapacity is still subsisting and binding upon the defendants, and the judge was wrong in holding that the proceedings which the plaintiff is

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taking for the purpose of enforcing his right to the allowance coal were proceedings to recover compensation for the injury and were barred by s. 1, sub-s. 2 (*b*), of the Act. The plaintiff is therefore entitled to judgment.

Appeal allowed.

Solicitors for plaintiff: *Timbrell & Deighton, for Hooper & Fairbairn, Dudley.*

Solicitors for defendants: *Mills, Curry & Gaskell, for F. W. Green, Dudley.*

W. F. B.

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April 29.

[IN THE COURT OF APPEAL.]

MULLHOLLAND *v.* WHITEHAVEN COLLIERY COMPANY.

Employer and Workman—Compensation—Permanent Incapacity—Committee representative of an Employer and his Workmen—Award of Lump Sum—Infant—Payment into Court—Excess of Jurisdiction—Duty to record Award—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., par.* 17; *Sched. II., pars.* 1, 9.

Where there exists under par. 1 of the Second Schedule to the Workmen's Compensation Act, 1906, a committee representative of an employer and his workmen with power to settle matters under the Act, which means with the function as incident to its constitution of settling matters under the Act, that is the tribunal to which for the purpose of settling any matter which under the Act is to be settled by arbitration the parties are to resort, subject to the right of either party by notice in writing within the time prescribed by the Act to object; it is not necessary that each individual workman should upon entering the employment have expressly or impliedly agreed to refer any dispute under the Act to such committee.

Semble, per Cozens-Hardy M.R. and Kennedy L.J., the award of such committee upon any matter within its jurisdiction is binding on an infant.

Where the award of such committee relates to a matter required by the Act to be settled by arbitration it is the duty of the registrar of the county court on being satisfied as to its genuineness to record it, and the judge has no jurisdiction to review it; but where the award is outside the jurisdiction of the committee there is no obligation to record it.

There is no jurisdiction under the Act to award a lump sum to a workman who is incapacitated by an accident except under par. 17 of

the First Schedule, which is limited to the case where a weekly payment has been continued for not less than six months.

Where, therefore, a workman, who was a minor, met with an accident whereby he lost two fingers, and, after his employers had paid him a weekly sum for five months and had taken him back to work, referred the question of compensation in respect of his permanent injury to a committee representative of the employers and their workmen, and the committee awarded him a lump sum and paid the money into the county court:—

Held, that the county court judge was not bound to record a memorandum of the award and that the money paid into Court ought to be paid out to the employers.

APPEAL from the refusal of the county court judge of Whitehaven sitting as arbitrator under the Workmen's Compensation Act, 1906, to record a memorandum of an award of a committee representative of the Whitehaven Colliery Company and their workmen.

It appeared that joint committees of colliery proprietors and their workmen appointed to arbitrate under the Workmen's Compensation Acts had existed for many years in Cumberland, and that this system had proved beneficial to both employers and workmen. The facts relating to the constitution of these committees were as follows. Shortly after the Workmen's Compensation Act, 1897, came into operation, the colliery owners in Cumberland formed an association called the Cumberland Coal Owners' Mutual Indemnity Company, Limited, for the purpose of meeting the financial burden imposed by the Act. At a meeting held on July 27, 1898, which was fully attended by representatives of both employers and workmen, a scheme was adopted for the appointment of joint committees for the purpose of arbitrating upon the various matters arising under the Act, and this scheme was re-adopted on the passing of the Act of 1906. By this scheme the joint committee for each colliery was to consist of six members, three to be appointed by the employers and three by the workmen; the employers' representatives to consist of the secretary for the time being of the Cumberland Coal Owners' Mutual Indemnity Company, who was to act as secretary to the joint committee, the employers' general manager, and the manager of the particular colliery, and the workmen's representatives to consist of the secretary for the time being of

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the Cumberland Miners' Association, who was to act as chairman of the committee, the miners' agent for the time being of the association for the district in which the colliery was situated, and the miners' delegate representing the particular colliery on the executive committee of the association.

On March 1, 1909, William Mullholland, a minor aged nineteen, who was a sawyer's labourer in the employment of the Whitehaven Colliery Company at Wellington pit, met with an accident arising out of and in the course of his employment whereby he lost two fingers of his right hand. His earnings were 9*s.* 1*d.* per week, and compensation at this rate was paid to him by the indemnity company until July 19, 1909. Mullholland then resumed work at the same wages as before the accident. Mullholland and his father pressed their representatives on the joint committee to insist upon payment of a lump sum in settlement of all claims in respect of the permanent injury to the hand, and at a meeting of the committee held on August 24, 1909, Mullholland was examined and an award of 100*l.* was made in his favour. Mullholland raised no objection to the amount of compensation awarded. The award was drawn up and signed on September 14 by the secretary to the Cumberland Miners' Association on behalf of the workmen and by the secretary to the indemnity company on behalf of the employers, and a memorandum thereof was sent by them to the registrars of the Whitehaven County Court for registration.

The memorandum stated that Mullholland was a minor and stated the date and nature of the accident and that on August 24, 1909, "the following decision was given by a committee representative of the said Whitehaven Colliery Company and their workmen having power to settle matters under the above-mentioned Act in the case of the said Whitehaven Colliery Company and their workmen, that is to say:—'Whereas the said Whitehaven Colliery Company has paid to the said William Mullholland the sum of nine shillings and one penny per week from the first day of March one thousand nine hundred and nine up to the nineteenth day of July one thousand nine hundred and nine by way of compensation under the Workmen's Compensation Act, 1906. And whereas the said William Mullholland has

recovered from his injuries (excepting the loss of the two said fingers of his right hand, below the second joints, which is permanent), and has resumed work as a surface labourer and is earning the same wages as he did before the accident; the committee has considered the case and awarded the sum of one hundred pounds to be paid to the said William Mullholland in final settlement and discharge of all his claims and demands under the above-named Act, or otherwise, in respect of the permanent injury to his right hand.'" The registrars then sent the usual notice (Form 37) to Mullholland with a copy of the memorandum. Shortly afterwards the 100*l.* was paid into Court, and notice of the payment in (Form 53b) was also given to Mullholland by the registrars.

Mullholland then gave notice through his solicitors that he intended to apply for an order that the 100*l.* might be dealt with as follows: 1*l.* 1*s.* to be paid to the solicitors for costs, 30*l.* to be paid to Mullholland forthwith, and the balance to be paid to him on his attaining the age of twenty-one years. When this application was made the registrars suggested that the amount of compensation was inadequate, and on December 7 they gave notice to the employers that they had refused to record the memorandum and had referred the matter to the judge pursuant to proviso (*d*) to par. 9 of the Second Schedule to the Act by reason of the inadequacy of the amount of compensation agreed to be paid to Mullholland, a person under legal disability, and requiring them to attend before the judge.

At the hearing before the judge oral evidence was given as to the constitution of the joint committee, and before the Appeal Court this evidence was supplemented by affidavits made by the signatories of the award with the result above stated.

The county court judge refused to record the memorandum and ordered the 100*l.* to remain in Court, and, if there was no appeal, to be invested and paid to the applicant by weekly instalments. He held that there was not in existence any committee representative of the employers and workmen inasmuch as the particular workman had not agreed that the committee should represent him and being an infant was incapable of making an agreement unless the Court approved the agreement as being

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for his benefit; that the award of 100*l.* was not in accordance with the Act and was inadequate; and that the action of the committee and the indemnity company proved the existence of a scheme to evade the Act, and that this scheme was void because not certified as required by s. 3 of the Act.

The employers appealed, and, at the suggestion of the Court, the workman, who was represented by the same solicitors as the employers, was added as an appellant.

C. A. Russell, K.C., and *T. Beven*, for the appellants. This appeal raises a question under par. 1 of the Second Schedule to the Act of 1906 (1), which provides for matters under the Act being dealt with by a committee representative of an employer and his workmen. The county court judge took the view that this committee was a scheme for contracting out of the Act which was void unless certified under s. 3, but there is no foundation for that view. Another ground which he gave for his refusal to record a memorandum of this award was that the compensation was inadequate having regard to the fact that the workman was a minor. The provisions relating to the recording of awards and agreements are contained in par. 9 of the Second Schedule, and the county court judge appears to have confused proviso (*a*), which applies to awards, with provisoes (*d*) and (*e*), which apply to agreements. There was no power to deal with the question of inadequacy except under proviso (*d*). But proviso (*d*), as well as proviso (*e*), which enables the county court judge to order the removal of the record from the register in cases of fraud or undue influence, relates to agreements only and has no application to an award. That these provisoes do not apply to an award of a representative committee is emphasized by par. 16 of the Second Schedule, which

(1) Workmen's Compensation Act, 1906, Sched. II., par. 1: "For the purpose of settling any matter which under this Act is to be settled by arbitration, if any committee, representative of an employer and his workmen, exists with power to settle matters under this Act in the case of the employer and workmen, the matter shall, unless either party objects by notice in writing sent to the other party before the committee meet to consider the matter, be settled by the arbitration of such committee, or be referred by them in their discretion to arbitration as herein-after provided."

empowers the Secretary of State to confer upon any committee of this kind various powers for the working out of an award which otherwise could have been exercised only by the county court judge and to exclude from the operation of provisoes (*d*) and (*e*) of par. 9 agreements submitted to and approved by such committee.

[BUCKLEY L.J. In the case of incapacity the Act provides only for weekly payments in the first instance. Except in par. 17 of the First Schedule, it gives no power to award a lump sum as compensation. Par. 17 is limited to a case in which weekly payments have been continued for six months. If that is not the case a lump sum can only be paid by agreement. Here the six months have not run. Where then does the committee get any jurisdiction to make this award?]

There is no express authority. But par. 17 is not intended as being the only source of the jurisdiction to give a lump sum. It deals only with the case of an employer applying to redeem his liability. If the parties are willing there is nothing in the Act to prevent a lump sum from being awarded. The scheme of the Act was to prevent as far as possible the employment of lawyers in disputes under the Act, and it may be that the terms of par. 1 of the Second Schedule are wide enough to give the joint committee, as distinguished from any other arbitrator, jurisdiction to award a lump sum in any claim for compensation arising under the Act. Assuming that the award was made without jurisdiction, then the 100*l*. was money voluntarily paid into Court and ought to have been paid out to the employers. With regard to the objection that this workman was a minor, assuming that the committee is properly constituted, it has power to deal with the case of an infant. This appears on the face of the Act. The definition of "workman" in s. 13 clearly contemplates a minor because it includes an apprentice. The same thing is shewn by the schedules, because a special scale of weekly payments is provided where the workman is an infant, and where a weekly payment is reviewed there is a difference in the jurisdiction of the reviewing tribunal in the case of an infant. This is a standing committee, and if the workman submits to the committee, whether he is an adult

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or an infant, the committee has power to deal with the claim. It cannot have been the intention of the Legislature that the advantages, e.g., cheapness and expedition, of resorting to a representative committee of this kind should be denied to every workman under twenty-one.

[COZENS-HARDY M.R. referred to *Rhodes* v. *Soothill Wood Colliery Co.* (1)]

An infant can make certain classes of agreements: *De Francesco* v. *Barnum* (2); *Green* v. *Thompson*. (3) He can enter into a contract of service and so get the benefit of this Act as being a person who is a workman within the Act. Except so far as the Act in terms makes a difference between the position of an infant and an adult workman they stand upon the same footing. It flows from the contract of service that a workman, whether adult or infant, has the right to obtain compensation in any of the modes provided by the Act, that is to say, by the decision of a committee, an outside arbitrator, or the county court judge. But where there is an agreement as to the amount of compensation, then, if the injured workman is an infant, before any legal effect can be given to it, it must be approved by the registrar under proviso (*d*) of par. 9 of the Second Schedule, and a further power is given to the judge under proviso (*e*). As regards the constitution of this committee the evidence shews that it was in fact a committee representative of these employers and their workmen. It cannot have been intended that such a committee should represent each individual workman, because that would involve the reconstitution of the committee whenever a fresh workman entered the employment, and that would be obviously unworkable. If any particular workman does not regard the committee as representative all that he has to do is to object to his claim being dealt with by that tribunal.

COZENS-HARDY M.R. This appeal raises questions of undoubted importance and of some difficulty with reference to the powers of a committee representative of an employer and workmen to make an award in a matter between a workman and the employer

(1) [1909] 1 K. B. 191. (2) (1890) 45 Ch. D. 430, 439.
(3) [1899] 2 Q. B. 1, 6.

under the Workmen's Compensation Act, 1906. I think it important to make it quite clear that where a committee of this kind is appointed, in the language which I will refer to more in detail in a moment, and an award is made, it is not a contracting out of the Act, it is not a scheme which requires to be certified under s. 3 of the Act; it is merely recognized and important machinery for giving effect to the provisions of the Act. The committee is bound by the principles and enactments of the Act, and any award that it makes must follow the provisions of the Act. The committee in fact is just as much bound by the provisions of the Act as any outside arbitrator or the county court judge, who in nine cases out of ten is the arbitrator. A committee of this kind is recognized by the Legislature; it is recognized in the schedule of the Act as an extremely important body, and I should regret if there was any foundation for the view that a committee of this kind, conducting an arbitration under this Act, ought not to be treated in any matter falling within the Act as entitled to the utmost respect and regard. The county court judge is not a Court of appeal from the committee. He has no jurisdiction of that kind at all. He is not entitled to treat an award of the committee as though it was simply an agreement between the workman and his employers which he might review under par. 9 (*d*) of the Second Schedule. It is something far more important than that; it is really an award binding upon both parties which ought to be recorded under par. 9 subject to the conditions therein mentioned, but with which the county court judge or the official recording has no power to interfere. Of such importance is the committee in the view of the Legislature that when a committee of this kind, namely, a committee representative of an employer and his workmen, exists, with power to settle matters under the Act, that is the body to which for the purpose of settling any matter which under the Act is to be settled by arbitration the parties are to go without anything more being done. They are to go there subject to this, that either party may by notice in writing, before the committee meet to consider the matter, object, and if that notice is given within that time, then the powers of the committee are not invoked and they would not exist with

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reference to that particular dispute. The matter then goes either to an arbitrator appointed by the parties if they can agree, or if not it goes to the county court judge. Then what is the nature of the committee? It is described in par. 1 of the Second Schedule as a committee representative of an employer and his workmen existing with power to settle matters under this Act in the case of the employer and workmen. What does that mean? I think that means a committee whose functions extend to that; that it must be a committee representative of the employer and workmen with those functions. It does not mean a committee to whom each individual workman when he enters into the contract of employment agrees to refer any dispute under the Act. All that the statute requires is the existence of a representative committee of this nature with these functions. Then, unless either party objects, that is the body to which disputes under this Act ought to be referred and must be referred, subject to such objection.

What then are the matters to be referred to this committee? What is the extent of par. 1 of the Second Schedule? It is limited to this: "for the purpose of settling any matter which under this Act is to be settled by arbitration." The scheme of the Act is so well known that I almost hesitate to spend more than a minute in even referring to it. The scheme of the Act is undoubtedly this: that, putting aside the case of death, an injured workman is entitled to compensation in the shape of a weekly payment calculated in various modes and liable upon review to termination, increase, or diminution, and all those matters undoubtedly are matters which are required by the Act to be settled by arbitration. There is one case, and one case only, in which a capital payment under this Act can be settled by arbitration (again I put aside all cases of death; I do not forget that that case arises), and that is found in par. 17 of the First Schedule. No right is given to the workman in any event to require his employer to pay a lump sum in satisfaction of or commutation of weekly payments, or in discharge of any future liability; but in one certain event, and only in one certain event, the employer may make an application to commute his liability for a capital sum, and that event is where any weekly

payment has been made for not less than six months. In that event "the liability therefor may, on application by or on behalf of the employer, be redeemed by the payment of a lump sum"; and then there are some particulars as to the mode of ascertaining the amount to be paid in one particular case, and in any other case the amount is to be settled by arbitration under the Act. With that exception, speaking for myself, I can find no instance in which there is any matter dealing with the question of a capital payment by the employer which under this Act is to be settled by arbitration. It is quite clear that the jurisdiction of the committee is limited to settling the matters stated in the opening words of par. 1. They have no jurisdiction over ninety-nine questions out of a hundred which may arise between employer and workmen, and they have no right, in so far as they may be arbitrators as between employer and workmen, to deal with matters not required under the Act to be settled by arbitration. And if they purport to deal with such matters they have no right, nor has the employer nor has the workman any right, to require the award to be recorded. The object of the recording is that the award may be capable of enforcement by the county court judge. Therefore it seems to me that when you come to consider whether an award ought to be recorded under par. 9 of the Second Schedule you must see in the first place whether it is a matter within the meaning of the Act which is required to be settled by arbitration. If it falls within that category, then it has simply to be recorded; and an award so recorded is not in any way capable of review or modification or setting aside by the county court judge under clause (*d*) of par. 9.

In the present case there was an admitted accident to a boy of nineteen and he was paid his full wages from March 1 of last year, which was the date of the accident, until July 19. Then he was given light work, I think, on the surface instead of going down into the mine. There was a reference to the committee about which I will say more in a minute. The committee made this finding. The boy had lost two or part of two fingers of his right hand, and this is the memorandum which the committee sent to the registrar to be recorded. [The

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Master of the Rolls read the memorandum.] That was followed by notice of the application to the registrar to record the memorandum being given as required by the Act to the workman. He, of course, did not object. The 100*l.* so awarded was paid into Court and is there now; then an application was made on behalf of the infant that the sum might be applied as follows: 1*l.* 1*s.* costs and 30*l.* to be paid out to the infant at once; the balance to be paid when he attained the age of twenty-one years. The learned county court judge refused to record the memorandum, it appearing to him that the memorandum ought not to be registered "by reason of the inadequacy of the amount agreed to be paid to the applicant, a person under legal disability." With great respect to the learned county court judge I am entirely unable to follow that reasoning. It was not for the learned county court judge to consider whether this compensation was adequate or not, or whether the workman was under age or not. It was not a case of compensation assessed by agreement between the parties. It purported to be an award by a committee which the county court judge had no right to review or challenge. But on the ground that the matter was not within the jurisdiction of the committee at all I think that the decision which the learned county judge arrived at on this point, namely, that he refused to record the memorandum, was right, but I entirely differ from the reasons by which the learned county court judge arrived at that conclusion. The learned county court judge says in effect "I do not believe that the committee have any right to interfere at all. It is an attempt to get outside the Act of Parliament altogether, but I will keep the 100*l.* in Court"—which could only be on the footing that there had been jurisdiction—"and then we will see what happens when the boy attains twenty-one." In my opinion that is impossible. If the award ought not to be recorded and the learned county court judge was right in refusing to record it, it seems to me unavoidable that the 100*l.* which was paid into Court on the assumption that it was an award which had been recorded or would be recorded must certainly be paid out; and as counsel for the employers are now instructed to appear for the workman also, I think that, they not objecting on behalf

of the infant, the proper order on this part of the case will be that the 100*l.* should be paid out to the employers, who paid it in, and the parties must be left to take such proceedings as they may be advised hereafter with reference to any further claims by this infant.

We have had a good deal of discussion as to the position of workmen under twenty-one, and although it is not necessary for the decision of this case, and although it may be that it is rather dangerous to express a view upon it, yet, having regard to the great importance of these committees and the extreme desirability of enabling them to discharge efficiently all their duties, I think it is right that I should say that, as at present advised, I think an infant may be bound by an award of such a committee, and I think so for this reason: an infant is, on the face of the Act, a person whom the Legislature contemplated as being entitled to the benefit of the Act. The Legislature contemplated also, as appears from almost every section, that questions under this Act should be settled by arbitration, and the Legislature by that par. 1 of the Second Schedule has said that where there is a committee of this kind the dispute shall be settled by this committee. There is no agreement required by the infant to give jurisdiction to the committee; the Act of Parliament itself gives the jurisdiction to the committee, reserving, however, both to the workman and to the employer a right, if they are so minded, to object to that jurisdiction and to go to some other tribunal. Therefore it is in my view not a case in which it is at all necessary to consider whether it was part of the contract of service that this should be done. I do not think it was. Nor is it necessary to consider whether there was any notice given to all the workmen that there was this committee with power to settle matters under the Act. It is in my view simply a tribunal which, unless one of the parties objects, is the tribunal which is to decide disputes under this Act. With regard to the constitution of this committee, I think we may assume from the evidence which is now before us that this was a committee representing the company and the workmen employed by the company at this colliery with power to settle matters under the Workmen's Compensation Act, 1906, and therefore the

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observations which I have made as to the jurisdiction of these committees will apply to this as to every other case. The result of our decision is that the learned county court judge was right in refusing to record this award and that the 100*l.* must be paid out of Court. I desire to say plainly that although I have arrived at that conclusion I do not in any way agree with the reasons given by the learned county court judge.

BUCKLEY L.J. I agree. Speaking with all respect to the learned county court judge I feel myself constrained to say that I am unable to agree with either the reasoning contained in his judgment or the conclusions at which he arrived. Having said that, I should have preferred to travel through the judgment and express my reasons for being of that opinion, but inasmuch as the grounds upon which I found my judgment do not require any such investigation I ought not to take time in so doing. If there be such a committee as is spoken of in par. 1 of Sched. II. of the Act of 1906, and the jurisdiction of that committee is not excluded by objection taken as mentioned in that paragraph, that committee is the tribunal to decide the matter to the exclusion of the county court and of everybody else excepting in the circumstances mentioned in the next following paragraph. The jurisdiction of the committee extends only to that which is committed to it by the Act. In respect of subsequent matters the county court may have jurisdiction, but for the purpose of the arbitration the committee is the tribunal, to the exclusion of the county court. Par. 1 speaks of a "committee representative of an employer and his workmen" existing "with power to settle matters under this Act." These words do not, I think, mean that it must be shewn that contractually there has been conferred as between the employer and the particular workman an authority to determine the matter as between those two parties. I think that what is meant is that if a committee representative of an employer and his workmen exists whose function it is to settle matters under this Act, the parties may resort to that committee if they are so minded, but they are not bound to resort to it if they are not so minded, because either one of them within the time mentioned in the Act can

object, and then that is not the tribunal to determine the matter. If we had to find, which I think we have not, whether this is a committee for this purpose, we should not, I think, have to see whether this particular man Mullholland had expressly or by implication contracted to be bound by the decision of this committee. I think the proper inquiry would be whether it was a committee with this function as incident to its constitution, and whether upon an appeal to the committee Mullholland had objected or not. In point of fact Mullholland did not object to that body accepting the responsibility of determining this question of compensation rightly or wrongly; he proceeded on the footing that they had done so rightly. But all that I pass by and go to the ground upon which this case falls to be determined. I think it is this. As I understand this Act of Parliament, if a workman sustain an accident for which he is entitled to compensation by reason of incapacity he is to be compensated as provided by the First Schedule to the Act, and the provisions of the First Schedule are that he shall be entitled to receive certain weekly payments by way of compensation. There does not exist anywhere in the Act, except in Sched. I., par. 17, any right to award a lump sum. The jurisdiction is to give a weekly sum, end it, diminish it, or increase it, as circumstances may arise, but it is always a weekly sum. In the case of death it is otherwise. That is not a matter with which I am dealing. I am dealing with the case of incapacity resulting from injury by accident. The jurisdiction is to give a weekly sum and nothing else. In Sched. I., par. 17, there is a jurisdiction to give a lump sum, but it arises only in the event where a weekly payment has been continued for six months, and the provision is that the employer may apply to the proper tribunal, whatever it is, for an order that his liability to continue the payment of a weekly sum be redeemed by the payment of a lump sum. What happened here was that the weekly payments had unfortunately only continued from March to July, a period of less than six months, so that in the tribunal there did not reside, as I read the Act of Parliament, any jurisdiction to give a lump sum. What the committee did was to give a lump sum, and the learned county

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court judge was asked to record that decision as being a decision under the Act of Parliament. If it was such, it was his duty to record it, he had no right to review or question it. But if it was not a decision under the Act of Parliament he was not bound to record it, and upon that ground (being a ground not taken by the learned judge at all) I think that the order which he ultimately made was right. He refused to record it, but in so doing he did not go far enough, as I will shew presently; but so far it seems to me that the order is good.

Knowing the facts which we now know, what is the proper order to make? This sum of 100*l.* has been paid into Court; it is in the county court now under the extraordinary circumstances which have been stated. The learned county court judge has affected to deal with this sum by keeping it in Court and directing it to be invested, although his decision proceeded on the basis that this was a sum, as in fact it was, which ought never to have come into Court at all. The proper order, I apprehend, is to pay it out to the employers. That is the order we ought now to make. I think it immaterial to consider whether upon the evidence before us this committee was a committee which could act in the matter of an arbitration between the employer and the workman, because whether that is established or not the 100*l.* will have to come out of Court because the committee had no jurisdiction to award it. I should like to add that the existence of committees of this description in cases of trade disputes between employers and workmen is of the very highest value. As I understand, this committee for a long while has adjudicated on many disputes, and it is quite plain that the parties in the proceedings before us had confidence in it, and there was no reason whatever to reject its decision. I should be very sorry if anything should be said to throw discredit on the proceedings of the committee, and in deciding as we are deciding we are doing nothing of the sort.

I do not think it necessary to decide the question whether an infant can be bound by a reference to that committee or not. I hold my judgment entirely in suspense upon that matter. I do not say he could not. On the contrary I could advance further reasons in addition to those given by the Master of the Rolls for

saying that an infant could be so bound, but the question does not arise before us, and I therefore expressly abstain from saying anything about it.

KENNEDY L.J. It appears to me in this case to be clear that the decision at which the learned county court judge felt himself justified in arriving cannot be maintained. We have only heard one side in this matter, as there is only one side appearing, but I think it is plain that the order is one that ought not to stand. He has ordered that the 100*l.* is to remain in Court, and if there is no appeal it is to be invested and paid to the applicant, who had, according to the reasoning of the learned county court judge, if I follow him, gone before a tribunal which had no authority to act and which could not bind either of the parties. The money under the order was to be invested and paid to the applicant as under the Act by weekly instalments. Why I do not know; because the decision which gave him the 100*l.* made no such provision, and the learned county court judge had no jurisdiction in the matter. I have very little to add to what has been said by the other members of the Court.

It is provided in the Second Schedule, par. 1, that for the purpose of settling any matter which under this Act is to be settled by arbitration, if any committee representative of an employer and his workmen exists with power to settle matters under the Act in the case of the employer and workmen, then, in the absence of objection by either party, that is to be the tribunal to settle the matter. Such a committee, in my opinion, upon the evidence, existed in this locality. There is also a provision made in the Second Schedule, par. 16, as follows: "The Secretary of State may, by order, either unconditionally or subject to such conditions or modifications as he may think fit, confer on any committee representative of an employer and his workmen, as respects any matter in which the committee act as arbitrators, or which is settled by agreement submitted to and approved by the committee, all or any of the powers conferred by this Act exclusively on county courts or judges of county courts, and may by the order provide how and to whom the compensation money is to be

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paid in cases where, but for the order, the money would be required to be paid into Court, and the order may exclude from the operation of provisoes (*d*) and (*e*) of paragraph (9.) of this schedule agreements submitted to and approved by the committee, and may contain such incidental, consequential or supplemental provisions as may appear to the Secretary of State to be necessary or proper for the purposes of the order." I think the scheme is pretty clear. It was felt that there would be in many cases, as there is here, a necessity for something beyond the mere judgment or decision of the committee, and that the committee should at a later stage have power to say how and to whom the compensation should be paid, and by this par. 16 such a committee as the one which exists in Cumberland can get from the Secretary of State an order which to a very large if not to the entire extent will enable the parties interested to keep clear of applications, with their necessary expense, to the Court at subsequent stages. I see that in Ruegg's Employers' Liability and Workmen's Compensation, 8th ed., p. 574, there is an instance given in the adjoining county of Durham. The committee there which answers to this committee in 1907 used this par. 16 and obtained an order from the Home Office which deals with the various subsequent proceedings which may be necessary, such as the payment of money which otherwise would have to be paid into Court, and the application of sums where the applicant or respondent is under a legal disability, thus enabling the whole matter to be worked out without any reference to the Court at all. But all the committee can do in the first instance is to come to a conclusion in the words of the Second Schedule, par. 1, "for the purpose of settling any matter which under the Act is to be settled by arbitration."

I confess that during a great part of the argument I thought that the view which has been expressed by the Master of the Rolls and Buckley L.J. was rather too narrow, and that "settling any matter which under this Act is to be settled by arbitration" might include the giving of a lump sum, although, excepting under this procedure by arbitration, unquestionably what is intended by the Act so far as a lump sum is concerned (in the

case not of death but of injury) is the giving of a lump sum at the termination of a period of six months, and not before. I have felt doubt whether one ought not to take a broad view of this and say that settling any matter by arbitration would include a power to deal at once with that which under certain circumstances can under the Act only be settled at a later stage, namely, after payment of a weekly sum for six months. It is noticeable that in the form of application for payment out the application is to pay a sum of money as assessed in commutation of weekly payments, which is not the fact. But, upon the whole, I differ from my brethren, who are very clearly of opinion that settling any matter under the Act which is to be settled by arbitration would not include the assessment of a lump sum in the case of injury. That being so, the result is that these proceedings have practically ended in nothing. I am very sorry. The result is that the 100*l.* must go back to the persons who paid it, and some proceedings will have to be taken, either by way of an agreement (which must, I suppose, be recorded subject to the approval of the Court) or by way of proceedings before the county court judge to assess. In view of that I cannot help regretting that the learned county court judge should already in his judgment have pronounced his opinion of what would be fair compensation on his view of the evidence, if he had to assess it between these parties. However, possibly the parties may come to an agreement, and no difficulty will arise in settling some sum which the learned county court judge would be able on consideration of the matter to approve as being a proper sum.

With regard to the question of infancy I desire to add nothing to what has been said by the Master of the Rolls, in whose view I concur. It seems to me that this Act, although reserving, I think, a power with regard to the payment out of money where the person entitled might be under legal disability, clearly did not contemplate anything different from that which is the fact, namely, that a large number of these workmen for whose benefit the Act is passed are treated throughout the Act as persons who may be parties to proceedings of this nature whether they are of age or not, and, in the absence, of course, of anything like

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unfairness or attempted unfairness, or something which obviously could not be for their interest and which is explained by some mistake on their part, I think they ought to be treated as though they were of age, so far as regards their power to enter upon an arbitration of this kind under the Second Schedule, par. 1.

The learned county court judge apparently was under the mistaken belief that what had been paid up to the five months was only half the workman's wages. I understand that he has been paid the full wages for the whole of that time.

Order varied.

Solicitors for all parties: *Blyth, Dutton, Hartley & Blyth, for Chapman & Baxter, Whitehaven.*

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Solicitor—Undertaking to pay Money to Person not Client—No Misconduct on Part of Solicitor nor Legal Proceedings pending—Disciplinary Jurisdiction of Court—Summary Order for Payment.

The Court has jurisdiction, on the application by a person to whom a solicitor gives an undertaking in his capacity as a solicitor, to exercise its summary procedure to compel the solicitor to carry out the undertaking, even though the applicant is not the client of the solicitor and the undertaking was not given in the course of legal proceedings, and there is no suggestion of dishonourable or discreditable conduct on the part of the solicitor.

Peart v. *Bushell*, (1827) 2 Sim. 38, and dictum of A. T. Lawrence J. in *In re a Solicitor, Ex parte Hales*, [1907] 2 K. B. 539, not followed.

ORIGINATING SUMMONS.

On October 8, 1909, Mr. Ivanitzky, a Russian subject who was the owner of certain mining claims in Russia, entered into a contract with the applicants, the United Mining and Finance Corporation, Limited, by which it was agreed (inter alia) that the applicants should use their best endeavours to procure to be incorporated a new company for the purpose of acquiring the

mining claims, and that 1000*l.* should be paid by the applicants on the signing of the contract, and a further sum of 5000*l.* a week later. The 1000*l.* was paid to Mr. Ivanitzky by the applicants, but they asked for and obtained from him a further week for payment of the 5000*l.* That week having expired, the applicants requested Mr. Ivanitzky, who lived in St. Petersburg, to give still further time for the payment, and through their solicitors, Messrs. Christopher & Son, suggested to the respondent, Mr. Becher, who was solicitor for Mr. Ivanitzky, that if he (the respondent) would go to St. Petersburg and see his client Mr. Ivanitzky he might be able to induce him to give new terms more favourable to the proposed purchasing company. It was thereupon arranged that two sums of 1000*l.* each should be placed in the respondent's hands, he giving the undertakings contained in the letters hereinafter mentioned. Accordingly on October 30, 1909, the applicants through their solicitors, Messrs. Christopher & Son, sent to the respondent a cheque for 1000*l.* upon the terms set out in a letter of that date from the respondent to Messrs. Christopher & Son. The letter, so far as material, was as follows:—

"October 30, 1909.

"I beg to acknowledge receipt of your cheque value 1000*l.* . . . . I undertake to repay the sum of 1000*l.* to you at any time after the 8th November in the event of terms not having been arranged with Mr. Ivanitzky by that date, or in the event of the further agreement necessary to carry out any new terms not having been signed by that date . . . .

"H. Percy Becher."

On November 5, 1909, the applicants through their solicitors, Messrs. Christopher & Son, sent to the respondent a further sum of 1000*l.* to be held by him upon the terms mentioned in a letter dated November 5, 1909, from Christopher & Son to the respondent, and accepted by him by a letter received by Messrs. Christopher & Son on the same date. The letters, so far as material, were as follows:—

"November 5, 1909.

"The 1000*l.* is handed to you on the condition that you do not part with same until a supplemental contract, satisfactory to our

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clients, has been entered into and the required alterations in the draft agreement agreed, and that you undertake to repay this sum of 1000*l.* to us at any time on demand after November 8th in the event of terms not having been arranged with Mr. Ivanitzky by that date, or in the event of the further agreement necessary to carry out any new terms not having been signed by that date, and the alterations in the draft agreed . . . .

"Christopher & Son."

"November 5, 1909.

"I have your letter of to-day's date covering cheque . . . . receipt of which I acknowledge in the terms of that letter.

"With regard to the repayment of the 1000*l.* I note you have put it as liable to be repaid on demand after the 8th instant, but as that is Monday next and I shall not get to St. Petersburg till late on Monday evening it is of course understood that this will be allowed to remain in my hands for a reasonable time to give me an opportunity of negotiating the alterations . . . .

"H. Percy Becher."

The applicants acquiesced in the respondent's suggestion that the money should remain in his hands for a reasonable time to give him the opportunity of negotiating the alterations. The respondent accordingly went to St. Petersburg, but Hamilton J. found as a fact on the hearing of the summons that (contrary to the contention of the respondent) no terms were arranged within the time limited by the undertakings. The applicants instructed Christopher & Son to write to the respondent for the return of the 2000*l.*, which they did on December 23, 1909. The respondent declined to repay the 2000*l.* as requested upon the ground that it seemed to him that there was a doubt as to whether in the circumstances Mr. Ivanitzky was not entitled to payment of the money, and as the respondent could not see his way to take any step which might render him in any way responsible to Mr. Ivanitzky, he thought it advisable to take the opinion of counsel. The respondent's case was that he was anxious to fulfil his undertakings, but that on the other hand he was in a dual capacity, and considered that he had no right to take any step to the prejudice of Mr. Ivanitzky's rights, that he desired that the

applicants should bring an action against him so that he could interplead and pay the money into Court, and that he had suggested to Messrs. Christopher & Son that that course should be adopted. Further, he was advised by counsel that in the circumstances of the case his undertakings were not enforceable.

It was admitted that the respondent had not been guilty of dishonourable or discreditable conduct. The applicants took out the originating summons on January 11, 1910, by which they applied to a Master for an order for the repayment to the applicants by the respondent of the 2000*l.* " in pursuance of his written personal undertakings contained in his two letters dated respectively October 30, 1909, and November 5, 1909, addressed to Messrs. Christopher & Son," solicitors for the applicants, and that the respondent pay the costs of and occasioned by the application.

On the hearing of the summons before the Master an issue was directed to be tried, which was set down in the non-jury list and came on for hearing before Hamilton J., at whose suggestion, and by consent of the parties, the order for the issue was discharged, and the summons was treated as though the Master had, when it was before him, referred it to the judge.

Montague Lush, *K.C.*, and *A. Houston*, for the respondent. The Court has no jurisdiction to make the order asked for by the summons. The disciplinary power of the Court over a solicitor as an officer of the Court for breach of an undertaking given by him is only exercised where one or other of two conditions exists—first, if the relation of solicitor and client exists, and the solicitor gives an undertaking to his client; or, secondly, if, apart from the relation of solicitor and client, the solicitor gives an undertaking in a proceeding before the Court. Where neither of those two conditions exists, the solicitor must be sued in the ordinary way in an action upon his undertaking: *Cocks* v. *Harman* (1); *In re Lowe* (2); *Ex parte Cobeldick.* (3) The fact that confidence is reposed in a solicitor is not sufficient to give the Court jurisdiction to make a summary order against the

(1) (1805) 6 East, 404. (2) (1807) 8 East, 237.
(3) (1883) 12 Q. B. D. 149.

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solicitor. If it were so, a landlord who let a house to a solicitor, or a tradesman who sold him provisions, could because he was a solicitor invoke the disciplinary powers of the Court to enforce payment of the rent or of the price of the provisions.

In *In re Grey* (1) the relation of solicitor and client existed, and the observations of the judges there must be read in the light of that relationship. In *Ex parte Hales* (2) A. T. Lawrence J. said that mere dishonourable conduct did not give the Court jurisdiction to apply the summary remedy against a solicitor; the dishonourable conduct must be in the course of legal proceedings. That was a case where the relation of solicitor and client did not exist, but there were legal proceedings pending. Here there were no proceedings in Court, nor did the relation of solicitor and client exist, and it is admitted that there has been no dishonourable conduct on the part of the solicitor. The Court therefore has no jurisdiction to make a summary order against the respondent. [They also referred to *Ex parte Evans* (3); *Allaway* v. *Duncan* (4); *In re Marchant.* (5)]

Next, assuming that the Court has jurisdiction, inasmuch as there is no suggestion of any misconduct or dishonourable conduct on the part of the respondent, the Court in the exercise of its discretion will leave the applicants to their remedy by action. The Court only exercises its disciplinary jurisdiction to enforce honesty in its officers: *In re Hilliard.* (6) There is here a bona fide dispute as to who is entitled to this money, and the respondent claims no interest in it. The respondent is afraid that if he pays the money to the applicants he may be made liable to pay it over again to his client.

Gore-Browne, K.C., and *H. Hurrell*, for the applicants. There is no suggestion that the respondent has in any way been guilty of dishonourable or discreditable conduct, but he has given an undertaking in his capacity as a solicitor to pay a sum of money, and the Court has jurisdiction to enforce that undertaking in a summary way: *In re Kerly, Son & Verden.* (7)

(1) [1892] 2 Q. B. 440.
(2) [1907] 2 K. B. 539.
(3) (1840) 4 Jur. 991.
(4) (1867) 16 L. T. 264.
(5) [1908] 1 K. B. 998.
(6) (1845) 2 D. & L. 919.
(7) [1901] 1 Ch. 467.

The summary jurisdiction of the Court can be exercised where there is no misconduct or dishonourable conduct. In *Ex parte Hales* (1) the solicitor acted perfectly bona fide, yet the Court made a summary order against him to pay a sum of money. In *In re Marchant* (2) the undertaking was not given by the solicitor in an action, nor was it given to his client. A mere breach of a solicitor's undertaking is in law equivalent to dishonourable conduct. The Court can enforce the undertaking summarily if it is given by a solicitor in his character as solicitor: *In re Gee* (3); *In re Pass* (4); *Swyny* v. *Harland* (5); Cordery on Solicitors, 3rd ed., p. 150. A solicitor who purchases goods from a tradesman does not contract in his character of solicitor. To found the summary jurisdiction of the Court it is not necessary that there should be either an action in which the undertaking is given or an undertaking given to a client. The Court will order a solicitor who has given an undertaking to a third person as a solicitor, that is to say, as an officer of the Court, to do what is right and proper, though his conduct may be in no way, morally speaking, blameworthy. That is a special burden placed upon a solicitor in consideration of the privileged position which the law gives him.

If an undertaking is given by a solicitor in his character of a solicitor it is sufficient to render him liable to the disciplinary jurisdiction although the undertaking is not given to his own client and no action is pending and although there is no suggestion of dishonourable conduct on his part: *In re Fairthorne* (6); *In re Gee.* (3) [They also referred to *In re Freston.* (7)]

Houston in reply. *In re Fairthorne* (6) and *In re Gee* (3) are in conflict with *Peart* v. *Bushell* (8), *In re a Solicitor* (9), and *In re Grey.* (10) Assuming there is jurisdiction where the solicitor is not acting in an action and is not the solicitor to the person to whom the undertaking is given there must be some

(1) [1907] 2 K. B. 539.
(2) [1908] 1 K. B. 998.
(3) (1845) 2 D. & L. 997.
(4) (1887) 35 W. R. 410.
(5) [1894] 1 Q. B. 707.
(6) (1846) 15 L. J. (Q.B.) 131.
(7) (1883) 11 Q. B. D. 545.
(8) 2 Sim. 38.
(9) (1888) 23 L. J. (N.C.) 143; 33 Sol. J. 76.
(10) [1892] 2 Q. B. 440.

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dishonourable conduct on the part of the solicitor. There must be a breach of professional duty. The solicitor must be trying to keep for himself that which it is his professional duty to hand to another person. In the present case the solicitor in effect says that he does not wish to retain the money, but he desires to know to whom he ought to pay it. In delivering judgment in *Ex parte Hales* (1) A. T. Lawrence J. said that even where there was dishonourable conduct on the part of a solicitor the Court had not jurisdiction to apply this summary remedy unless there was dishonourable conduct "to the applicant in the course of legal proceedings." The object of the summary remedy is to enforce honesty. To employ it merely to obtain payment of a debt is an abuse of the process of the Court. In the present case the respondent did not give the undertaking in the character of a solicitor.

HAMILTON J. In this case the respondent takes the preliminary objection that there is no jurisdiction to make the order asked for by this summons. It is admitted by the applicants that the respondent is not acting as their solicitor and that he has not been guilty of dishonourable or discreditable conduct. The undertakings were not given in the course of any pending legal proceedings. They were connected with more or less legal documents and negotiations in which solicitors were concerned, but there was no pending legal proceeding in which the undertakings were given, so that the undertakings are not given directly either to the Court or to a party in a suit. There is therefore no undertaking which can be said even in principle to be given to the Court although not given actually in the presence of the Court. A passage from the judgment of A. T. Lawrence J. in *Ex parte Hales* (1) was relied upon in support of the respondent's objection. A. T. Lawrence J. said: "I quite agree with Mr. Shearman's contention on behalf of the respondent that mere dishonourable conduct does not give the Court jurisdiction to apply this summary remedy. The dishonourable conduct in such cases in order to give the Court jurisdiction must be dishonourable conduct to the applicant in the course of legal

(1) [1907] 2 K. B. 539.

proceedings, and if the applicant can shew that there has been dishonourable conduct to him, prejudicing his position, it is then that he can come to the Court and say 'I ask for the interposition of the Court by way of this summary remedy.'" With reference to that passage the following points are to be observed. First, it does not appear to have been founded upon any exhaustive examination of the authorities which have been relied on before me, although it is true that *In re Pass* (1), to which I am about to refer, was included in the cases which were cited; secondly, it does not appear that the particular point as to jurisdiction was fully raised in *Ex parte Hales* (2); thirdly, I do not observe that Darling J., who with A. T. Lawrence J. constituted the Court, enunciated the proposition which the passage contains; and fourthly, I think I am right in saying that for the purpose of the decision in that case it was not necessary to define exhaustively what the conditions are under which this jurisdiction can be exercised, nor does it appear to me that A. T. Lawrence J. intended to define exhaustively all the conditions which must exist in order that the Court may exercise its summary jurisdiction. I, of course, pay the greatest attention to that passage, and if there were no authorities to the contrary I should be very loath not to follow it; but it appears to me that there are clear authorities to the contrary. Cordery on Solicitors, 3rd ed., pp. 150, 151, summarizes the law conveniently and points out that the Court will summarily enforce undertakings given by a solicitor in that character, adding "it matters not that his services are gratuitous, or that the undertaking is given after judgment, or even that it is not given in an action, but in a mere mortgage or loan transaction. But the solicitor must be acting professionally." Three at least of the authorities cited to me in the present case are instances in which a solicitor was directed under this jurisdiction to make payments of money though moral turpitude was not alleged and the applicant did not apply in the course of pending legal proceedings. In *In re Gee* (3) Coleridge J. said: "The question in either case is, has the undertaking which it is sought to enforce, been given by the attorney in his character

(1) 35 W. R. 410. (2) [1907] 2 K. B. 539.
(3) 2 D. & L. 997.

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of attorney in the transaction in dispute." In *In re Gee* (1) the decision in *In re Hilliard* (2) does not appear to have been cited, but as the judgment in *In re Hilliard* (2) was delivered by the same learned judge (Coleridge J.) after consideration and only shortly before his decision in *In re Gee* (1), both in the year 1845, I do not think that in *In re Gee* (1) Coleridge J. could have meant to say anything in conflict with his decision in *In re Hilliard* (2), where he held that in exercising this jurisdiction "the Court does not interfere merely with a view of enforcing contracts, on which actions might be brought, in a more speedy and less expensive mode; but with a view to securing honesty in the conduct of its officers, in all such matters as they undertake to perform or see performed, when employed as such, or because they are such officers." Then he says, a little later, "I have no desire to narrow the jurisdiction of the Court as to these undertakings on any such ground as the present"—that ground being that the Statute of Frauds was relied on, which I suppose would have been more appropriately raised in the alternative mode of proceeding by action than on this kind of summons—"they" (that is to say, undertakings) "are very often most beneficially made for both parties in a cause, and there would be great injustice in letting the attorney loose from them, after the party has foregone the advantage or paid the price which was the consideration; while there is no hardship on the attorney in enforcing them; he is never compelled to enter into them; if he does, he should secure himself by his arrangement with his client, and he must be taken to know the legal consequences of his own act." That judgment (which has been frequently referred to since) shews, first, that it is not a mere question of a speedy, convenient, or inexpensive mode of trial. Vaughan Williams L.J. in *In re Marchant* (3) describes the procedure as "what I may call an action commenced in this convenient way by an originating summons," but I do not think that he intended or purported to decide that the question whether to resort to the disciplinary jurisdiction or to an action can be decided by mere reference to the speed of the

(1) 2 D. & L. 997. (2) 2 D. & L. 919.

(3) [1908] 1 K. B. 998.

summary jurisdiction or its convenience to one of the parties, if not to both, as compared with an action. The second point is that although Coleridge J. places the jurisdiction in terms upon the ground that it is exercised with the view of securing honesty in the conduct of its officers, honesty in that regard is not meant by him to be purely a moral quality, but is, as is evident from the decision in *In re Gee* (1) and other cases, a term applicable to the proper and professional observation of undertakings professionally given. The conduct which is required of solicitors is to this extent perhaps raised to a higher standard than the conduct required of ordinary men, in that it is subject to the special control which a Court exercises over officers so that in certain cases they may be called upon summarily to perform their undertakings, even where the contention that they are not liable to perform them is entirely free from any taint of moral misconduct. During the arguments in the present case *In re Fairthorne* (2) and *In re Pass* (3) were cited. In *In re Pass* (3), which was decided by a Divisional Court, there was no moral turpitude nor were there any pending legal proceedings, and the undertaking was not given to the solicitor's own client. In *In re Fairthorne* (2) Williams J. said: "The question therefore in this, as in every other case, is, whether the attorney was acting in that character when he gave the undertaking." The expression in Lord Coleridge C.J.'s judgment in *In re Pass* (3) is: "It is clear that Mr. Pass entered into the undertaking as a solicitor, and the trustees might not have accepted the guarantee had it not been entered into by him as such, for a special advantage is derived from a guarantee given by an officer of the Court that it is enforceable by the creditor in a summary manner, without the trouble and expense of bringing an action against the guarantor"—language that no doubt goes further than any previous language in the direction of saying that the convenience of enforcing solicitors' undertakings summarily is one of the principal tests with regard to the exercise of the jurisdiction. I cannot disregard these authorities I must hold that the jurisdiction in the circumstances of the

(1) 2 D. & L. 997. (2) 15 L. J. (Q.B.) 131.
(3) 35 W. R. 410.

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present case is clearly made out. Two authorities only which are really in point have been cited to the contrary; one is a decision of Hart V.-C. in *Peart* v. *Bushell* (1), where he is reported to have said that it did not come within his jurisdiction to order a solicitor to perform an undertaking, which he had given on the sale of an estate, to cause satisfaction to be entered upon any judgment that might be found against one of the parties through whom the vendor traced his title. The observations I desire to make as to that case are that no authority whatever was cited before the Vice-Chancellor, and the report of the case is said by Mr. Simons to be ex relatione some anonymous person whose name he does not give. In the teeth of the other decisions to which I have already referred I am unable to follow *Peart* v. *Bushell.* (1) The other case which was cited in support of the contention that there is no jurisdiction to entertain the application was a decision of Chitty J. in *In re a Solicitor.* (2) As far as can be made out from the meagre report in the *Law Journal* Notes of Cases (and I think this view is confirmed by the language of the report in the *Solicitors' Journal*), that was a decision with regard to the discretion of the Court, and not upon its jurisdiction, and therefore does not touch the present point. Were it otherwise, it does not appear to me that I can refuse to follow *In re Gee* (3), *In re Fairthorne* (4), and *In re Pass.* (5) The expression used in the judgments in those cases was "in his capacity as a solicitor" or its equivalent. That is an expression which is, no doubt, not very easy to define with any extreme precision, but I think that in order that the jurisdiction may arise proof by the applicant is involved (if he is put to the proof) that the undertaking was given by the solicitor in his capacity as a solicitor, and that the event has happened upon which he ought to perform it.

It is, however, always competent to the solicitor to urge that there are grounds upon which the Court should refuse to exercise its discretion in the matter. Accordingly it becomes necessary to deal with the facts and to decide first whether

(1) 2 Sim. 38.
(2) 23 L. J. (N.C.) 143; 33 Sol. J. 76.
(3) 2 D. & L. 997.
(4) 15 L. J. (Q.B.) 131.
(5) 35 W. R. 410.

the applicants have made out their case. [The learned judge then minutely examined the facts, and, having held that the undertakings would make the 2000*l.* in the respondent's hands money received to the use of Mr. Ivanitzky in certain events and that upon the facts he should have no doubt that the respondent received the two sums of 1000*l.* "in his capacity as a solicitor," continued:—] Whatever that expression may mean, I think it must at least go as far as this, that when a solicitor, in the course of business which he is conducting for clients with third parties in the way of his profession, gives an undertaking to those third parties incidental to those negotiations, that undertaking is one which is given in his capacity as a solicitor and not as a mere layman undertaking the office of stakeholder or guaranteeing the payment of money. It seems to me that the part which solicitors are nowadays well known to play in elaborate negotiations, which constantly have to be embodied at various stages in legal forms of a highly technical character, constantly involves for the purpose of facilitating the business the giving of subsidiary undertakings for the payment of money and of a similar character, and that those undertakings are given in their capacity as solicitors, and money is entrusted to them under those undertakings largely because they are solicitors and are deemed therefore, and found to be, especially worthy of trust. [The learned judge further found upon the facts that upon the events which had happened the money in the respondent's hands was money repayable to the applicants by the terms of the undertakings, and concluded:—] In spite of the respondent's contention I cannot see that any injustice will be done to him in not remitting the applicants to an action the sole object of which would be to give him the opportunity of taking out an interpleader summons, as I think he might have done long ago. I cannot see that these proceedings are oppressive in any respect. I think that when a solicitor gives an undertaking of this character the parties to whom the undertaking is given are, under the practice, entitled to resort to this ready mode of determining disputes (which the solicitor is entitled to raise) and to obtain an order for payment if the solicitor fails.

Accordingly the conclusion at which I have arrived is that

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there is no reason, as a matter of discretion, why I should not order the undertakings to be fulfilled in accordance with their terms in the events that have happened. There must therefore be an order that the respondent perform his undertakings and pay the costs of these proceedings. (1)

Order accordingly.

Solicitors for applicants: *Christopher & Son.*
Solicitor for respondent: *H. P. Becher.*

(1) Note.—In a discussion which ensued as to the exact form of order which should be made, Hamilton J. said that throughout the case he had accepted and acted upon the disclaimer by the applicants of any charge of dishonourable conduct. As he understood that the respondent as a solicitor felt that misconstruction might be placed upon his conduct if an order were made against him in the form in which it was asked by the summons, he offered (if the respondent should so desire, and in order to prevent as far as possible any misconception arising on the part of persons who were not acquainted with the facts) to make no order except that the respondent pay the costs of the summons provided the money were paid to the applicants within forty-eight hours. Counsel on behalf of the respondent, however, having stated that the respondent desired to appeal, Hamilton J. made an order that, if the 2000*l.* and interest which had accrued, or which would have accrued if the money had been kept on deposit at a bank, be paid into Court within four days, and notice of appeal be given and the appeal entered within fourteen days, execution on the order should be stayed until the appeal was disposed of. The respondent paid the money into Court and entered notice of appeal within the times limited by the order.

J. E. A.

KISH *v.* TAYLOR.

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May 2, 3, 4, 5, 6, 27.

Shipping—Putting into Port of Refuge—Necessity of, caused by Unseaworthiness—Deviation—Effect of on Contract of Carriage—Lien for "Dead Freight"—Unliquidated Damages for Short Loading.

Where in the course of a voyage it becomes necessary for the safety of the ship and cargo to put into a port of refuge, a deviation for that purpose is justifiable and proper, none the less because the necessity for it was caused by the shipowner's wrongful act in sending the ship to sea in an unseaworthy condition, and it consequently has not the effect of putting an end to the contract of carriage or of relieving the cargo owners from the obligations which the contract contains.

Where by a charterparty or bill of lading a lien is given to the shipowner for "dead freight" that expression must be taken to include unliquidated damages for a breach of contract by the charterer in failing to load a full and complete cargo.

McLean v. *Fleming*, (1871) L. R. 2 H. L. Sc. 128, followed.

Gray v. *Carr*, (1871) L. R. 6 Q. B. 522, not followed.

Trial before Walton J. without a jury.

The plaintiffs were the owners of the steamship *Wearside*, and by a charterparty dated December 18, 1907, chartered her to the Mississippi Transportation Company to proceed to Mobile and Pensacola and there load a full and complete cargo of pitch pine timber and to carry the same to Dunkirk, Rotterdam, and Liverpool. By the terms of the charterparty the master or owners were "to have an absolute lien for all freight, dead freight, demurrage, and average." In pursuance of the charterparty the *Wearside* proceeded to Mobile and Pensacola and there loaded 801 standards only, the vessel being capable of carrying 1463 standards. Having loaded the 801 standards, the charterers declared themselves unable to load any more, and thereupon the plaintiffs, in mitigation of the loss arising from the charterers' breach of contract in failing to load a full and complete cargo, procured other cargo amounting to 661 standards, with which they filled up the vessel. The freight obtained in respect of these 661 standards was less than the chartered freight by a sum of 1387*l.* The *Wearside* being so loaded started on her voyage. At the time she did so she was in fact unseaworthy, owing to an excessive quantity of the cargo being piled upon the deck to

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a height of eighteen feet. Shortly after she had started she met with heavy squalls which caused her to lurch to port, and before she could recover herself the deck cargo had shifted, carrying away the lashings and tearing up some of the deck plates. The water poured into the holds through the holes in the deck, and it became necessary to put the ship into a port of refuge. She accordingly proceeded to Halifax, where temporary repairs were effected, and the vessel proceeded on her voyage. The necessity for putting into Halifax was, as the judge found, due to her unseaworthy condition at the time when the voyage commenced. The defendants were the holders of bills of lading of a portion of the timber shipped by the charterers. By the terms of the bills of lading the consignees were to pay freight for the goods at the rate therein specified, "all other conditions as per charterparty." The defendants' timber was to be delivered in Liverpool, and on arrival of the ship at that port the plaintiffs claimed to exercise a lien upon that timber for the said sum of 1387*l.* as being dead freight, and the defendants, in consideration of the plaintiffs delivering the cargo, undertook to pay the amount, if any, for which a Court might hold that the plaintiffs were entitled to exercise their lien. The action was brought upon that undertaking.

Bailhache, K.C., and *Adair Roche*, for the plaintiffs.

Atkin, K.C., and *Holman Gregory*, for the defendants. It is conceded that the lien for dead freight given by the charterparty is incorporated in the bills of lading, but the lien for "dead freight" so incorporated does not apply to the facts of the present case. There was no clause in the charterparty specifying an agreed rate at which dead freight should be payable. In the absence of such a clause the compensation for failure to load a full and complete cargo must be in the nature of unliquidated damages. And in *Gray* v. *Carr* (1) it was decided by the Exchequer Chamber that a lien for dead freight does not include a lien for unascertained damages for short loading. Shortly before the decision in that case it had been held by the House of Lords in *McLean* v. *Fleming* (2) that a lien for dead

(1) L. R. 6 Q. B. 522. (2) L. R. 2 H. L. Sc. 128.

freight did include a lien for damages for short loading. But in that case Lord Chelmsford pointed out that the case could "hardly be considered to be one of unliquidated damages, because the master, not having brought home any other goods than those of the appellants" (the freighters), "the proper measure of the shipowner's claim appears to be the amount of the agreed freight which he would have earned upon the deficient quantity of 210 tons of bones"; and upon that ground the judges in *Gray* v. *Carr* (1), who had the decision in *McLean* v. *Fleming* (2) before them, distinguished it. In the present case the damages are clearly unliquidated, for allowance must be made for the freight payable in respect of the 661 standards with which the plaintiffs filled up the vessel. Therefore the decision in *Gray* v. *Carr* (1) governs the present case. Moreover, the decision in *McLean* v. *Fleming* (2), if it were in conflict with *Gray* v. *Carr* (1), would not be binding on this Court. The decisions of the House of Lords when sitting as a Court of Appeal from the Scotch Courts are not binding upon the English Courts.

Secondly, even if a lien for dead freight does include a lien for unliquidated damages for failing to load a full cargo, the plaintiffs here cannot rely on the charterparty as giving such a lien. For the contract contained in it was put an end to by the unjustifiable deviation of the ship to Halifax. The implied undertaking not to deviate has the effect of a condition, and if that condition is not complied with the failure to comply with it displaces the contract: *Joseph Thorley, Ld.* v. *Orchis Steamship Co., Ld.* (3) No doubt a ship may lawfully deviate from her contracted voyage if it be necessary for the safety of ship or cargo; and here it is not disputed that it was necessary for the safety of the ship and cargo that she should put into Halifax. But to the liberty to deviate for that purpose there is an exception where the necessity of putting into the port of refuge is due to the initial unseaworthiness of the ship. The shipowner cannot be allowed to take advantage of his own wrong in sending the ship to sea in an unseaworthy condition. If the owner

(1) L. R. 6 Q. B. 522. (2) L. R. 2 H. L. Sc. 128.
(3) [1907] 1 K. B. 660.

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sends a ship on a voyage with a supply of coal which to his knowledge is insufficient to take her to her destination, her subsequently putting into a port to get more coal would be a deviation none the less because it was necessary for the safety of the ship.

Bailhache, K.C., in reply. The master's act in putting into Halifax was not a deviation at all. "Where the safety of the adventure under the master's control necessitates that he should go out of his course, he is not only justified in doing so, but it is his duty in the right performance of his contract with the owners of the cargo": per Lopes L.J., *Phelps & Co.* v. *Hill* (1); and it is not the less his duty to the cargo owners to go to a port of refuge when necessary, because the ship was unseaworthy at the commencement of the voyage. The reason why a voluntary deviation has the effect of wiping out the exceptions of the charterparty is because it makes the voyage a different one from that contracted for. "The true objection to a deviation . . . . is that the party contracting has voluntarily substituted another voyage": per Lord Mansfield, *Lavabre* v. *Wilson*. (2) But unseaworthiness does not make the putting into a port of refuge a different voyage. The implied warranty of seaworthiness, unlike the undertaking not to deviate, is not a condition going to the root of the contract so that non-compliance will prevent the shipowner from setting up the exceptions: *The Europa*. (3) If a ship starts with an obviously insufficient supply of coals the shipowner must be taken to have intended to deviate ab initio. There was obviously no such intention to deviate in the present case. Then if the plaintiffs are not disentitled to rely on the provisions in the contract of carriage, those provisions give a lien as against the consignees for the loss arising from short loading. The case is directly covered by *McLean* v. *Fleming* (4), and if the case of *Gray* v. *Carr* (5) is in conflict with it the decision of the House of Lords must prevail. The judgments in *Gray* v. *Carr* (5) were prepared before the judgments in *McLean* v. *Fleming* (4) were delivered, and the judges in the

(1) [1891] 1 Q. B. 605.
(2) (1779) 1 Doug. 284, at p. 291.
(3) [1908] P. 84.
(4) L. R. 2 H. L. Sc. 128.
(5) L. R. 6 Q. B. 522.

former case, when they came to deliver their judgments, though they had a note of the decision in *McLean* v. *Fleming* (1) before them, presumably had an insufficient note. Brett J. distinguished the House of Lords case upon the ground that there the damages were really liquidated. But Lord Chelmsford expressly said that whether the damages were ascertained or not the charterparty gave the shipowner a lien for his claim on account of deficient cargo. And Lord Westbury dealt with the case on the assumption that the damages were unliquidated, for he said that the inconvenience of holding that the shipowner was entitled to a lien during the time occupied in ascertaining the amount of the unliquidated damages could not be taken into consideration in answer to the clear words of the contract. Further Brett J. distinguished the case on the ground that there the holders of the bills of lading were also the charterers, and that the Lords did not hold that the lien was available against the holders of the bills of lading as such. He seems to have assumed that the bills of lading in *McLean* v. *Fleming* (1), like those in the case before them, contained the words "all other conditions as per charterparty," which was not the fact. The other judges in *Gray* v. *Carr* (2) who agreed with Brett J. accepted his statement of the effect of *McLean* v. *Fleming* (1); in other words they proceeded upon a misapprehension of the grounds of the decision. Bramwell and Cleasby BB. dissented, the former holding himself bound by *McLean* v. *Fleming*. (1) The text-writers, Carver on Carriage by Sea, 4th ed., s. 666, and Scrutton on Charterparties, arts. 157 and 161, treat the case of *McLean* v. *Fleming* (1) as concluding the point that a lien for dead freight includes a lien for unliquidated damages. On the other hand, Bray J. in *Red R. Steamship Co.* v. *Allatini* (3) said, obiter, that if he had to decide the point he would feel great difficulty in not following the decision of the Exchequer Chamber in *Gray* v. *Carr*. (2)

Cur. adv. vult.

May 27. WALTON J. In this case the plaintiffs are the owners of a steamship called the *Wearside*, which was chartered

(1) L. R. 2 H. L. Sc. 128. (2) L. R. 6 Q. B. 522.
(3) (1909) 14 Com. Cas. 82.

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by a charterparty under which she was to load a complete cargo of timber at Mobile and Pensacola, and the defendants are the holders of bills of lading of part of the timber that was loaded under that charterparty. The question which arises in the case is whether the plaintiffs are entitled to a lien upon the defendants' timber in respect of a loss which the plaintiffs suffered in consequence of the charterers not loading a full and complete cargo, as they were bound to do by the terms of the charterparty. By the charterparty a lien was provided for in these terms: "The master or owners to have an absolute lien upon the cargo for all freight, dead freight, demurrage, and average." By the terms of the defendants' bills of lading the consignees were to pay freight for the goods at the rate therein mentioned, "all other conditions as per charterparty." It is not disputed that those words do import into the bill of lading the term of the charterparty by which the master and owners are to have an absolute lien upon the cargo for, amongst other things, dead freight, and the question which I have to decide is whether the plaintiffs by virtue of that clause so imported into the bill of lading are under the circumstances of this case entitled to a lien upon the defendants' timber for the loss which I have mentioned.

The vessel loaded timber at Mobile and Pensacola, but did not load a full cargo. Only 801 standards were loaded, whereas the vessel was capable of carrying 1463 standards. The plaintiffs, in order to lessen the loss, procured other cargo with which to fill the ship, but at lower freights, and after making allowance for those freights they incurred a net loss of 1387*l.* as the result of the charterers' breach of contract, and for that sum they claim that they have a lien upon the defendants' goods.

The main points taken by the defendants in their defence are two. In the first place it was alleged in the defence that at the time when the *Wearside* sailed from Pensacola she carried an excessive deck load, and in consequence thereof was unseaworthy. The conclusion at which I have arrived upon the evidence is that that allegation was made out. The defence then went on to allege that in consequence of her unseaworthy condition she fell

over on her port side, and it became necessary to deviate her, and she deviated from her voyage and proceeded to Halifax. There is no doubt that she did fall over on her port side, and I think that that was in consequence of her excessive deck load. There is also no doubt that when that happened the master did what he was justified in doing and what I think he was bound to do; he put into Halifax as a port of refuge in order to repair and make the ship fit to proceed on her voyage. The defendants then say that that was a deviation, that it was a departure from the voyage, and that in consequence the defendants are not bound by the terms of the bills of lading and that the lien cannot be enforced against them. No doubt, if it was a deviation in the strict sense, that is to say, an improper deviation, the consequences claimed would follow, and the defendants would not be subject to any lien under the bills of lading. But, ordinarily, if a vessel in the course of her voyage puts into a port of refuge necessarily for the safety of the ship and cargo, that is not a deviation, and the effect of it is not in any way to interfere with the contractual rights of the parties under the bills of lading. But it is said by the defendants that in this case the deviation was improper because it became necessary in consequence of the vessel being unseaworthy. Whether that contention is correct is the first question of law which I have to decide. Was the putting into Halifax in consequence of the ship's unseaworthiness a deviation having the effect of discharging the defendants from their liabilities under the bills of lading? It was suggested that the obligation to have the ship seaworthy at the commencement of the voyage is a condition of the contract in the sense that unless the condition is fulfilled the contract cannot be enforced. I think it is well settled that that is not so. If a vessel commences a voyage in such a condition that in some respect she is not seaworthy, and if she completes her voyage in safety without any loss or damage, the shippers cannot set up that the voyage was not a voyage under the charterparty because the vessel was not seaworthy when the voyage was commenced. They are bound to pay for the freight according to the terms of the contract of carriage. If in the course of the voyage there is some loss or damage which is occasioned or contributed to by the

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unseaworthiness of the vessel, then no doubt the shipowner is liable for that loss even though it is a loss which is within the perils excepted by the bill of lading. On the other hand, if there is a loss which is in no way caused or contributed to by the unseaworthiness, and if it is within the excepted perils, the shipowner is not liable for that loss, and can rely on the terms of the bill of lading which exempted him from liability. That seems quite clearly established. Applying that to the present case I think the result is this: When the vessel left Pensacola, and when she was sailing on March 14 before the accident happened which obliged her to put into Halifax, she was upon the chartered voyage. That being so, the accident happened, and it was the duty of the master, as I have said, to put into the port of refuge, and he did so. Is that an improper deviation? I have come to the conclusion that it is not. It may be that the owners of the cargo cannot be charged with any part of the port of refuge expenses, because those expenses were occasioned by the unseaworthiness of the ship. But it would be going a great deal further to say that putting into the port of refuge when it was necessary to do so was an improper deviation because but for the unseaworthiness it would not have become necessary. I think that there was here no such deviation as interfered with the obligations of the parties under the bills of lading, except that, as I have already said, the cargo owners would not be liable for any of the expenses of putting into Halifax.

The second point raised by the defendants presents more difficulty. It is contended that the plaintiffs' claim is a claim for unliquidated damages, there being no fixed sum per ton or per standard in the charterparty which is to be paid under the named dead freight, and that a lien for dead freight cannot include a lien for unliquidated damages. The authority relied on in support of that contention is the well-known case of *Gray* v. *Carr*. (1) There, as here, by the terms of the charterparty the owners were to have an absolute lien on the cargo for all freight, dead freight, demurrage, and average, and by the terms of the bill of lading the consignees were to pay freight, and all other conditions as per charterparty. Therefore so far as the

(1) L. R. 6 Q. B. 522.

charterparty and bill of lading are concerned for the purposes of this case the terms are practically identical, and the very question which I have to decide arose in that case. The Court there were divided. It was held by Kelly C.B., Willes and Brett JJ., and Channell B. that no lien was given for damages for short loading under the term "dead freight." If I am bound by that decision there is an end of the case, and the plaintiffs are not entitled to the lien which they claim. But there is another case, which was in the House of Lords, *McLean* v. *Fleming* (1), in which the same question arose. There there was a lien given by the charterparty for dead freight. It is true that the consignee, who received the cargo, and as against whom the question arose, though not nominally the charterer was practically the charterer, because the charterparty had been effected with him, and therefore he was bound directly by the charterparty, and not merely by the bill of lading importing the lien from the charterparty. But I cannot see that that makes any difference. The question as to the extent of the lien, that is to say, whether dead freight includes unliquidated as well as liquidated damages, must be precisely the same whether the clause to be construed is in the charterparty or in the bill of lading. It was held by the House of Lords that a lien for dead freight gave a lien for unliquidated damages in respect of the loss suffered by the shipowner in consequence of a full cargo not being shipped. *Gray* v. *Carr* (2) was argued in November, 1870, and February, 1871, and the judgment of the Exchequer Chamber was delivered on June 15, 1871. The judgment in *McLean* v. *Fleming* (1) was delivered on April 3, that is between the dates of the arguments and of the judgment in *Gray* v. *Carr.* (2) It had not been reported in any of the reports at the time when the judgment was delivered in *Gray* v. *Carr.* (2) *McLean* v. *Fleming* (1) was a Scotch case. It had not been referred to in the arguments in *Gray* v. *Carr* (2), but when the judges came to deliver their judgments in that case it was referred to and distinguished. I have now to consider whether I am bound by the judgments in *Gray* v. *Carr* (2), distinguishing *McLean* v. *Fleming.* (1) If *McLean* v. *Fleming* (1) stood alone, it seems to me perfectly

(1) L. R. 2 H. L. Sc. 128. (2) L. R. 6 Q. B. 522.

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plain that I could not distinguish the present case from it, that I should be bound to follow it and say dead freight includes such a loss as the plaintiffs have here suffered. I have looked carefully into the judgments in *Gray* v. *Carr* (1), and the reason why the judges there thought that their decision did not conflict with *McLean* v. *Fleming* (2) seems to be that which was stated by Brett J. (3) Having referred to *McLean* v. *Fleming* (2), he said: "Now under those circumstances it was pointed out by some, if not all of the learned Lords who took part in the judgment, that the damages for not loading a full cargo were in point of fact ascertained, because they would be the specified amount per ton upon the quantity that was really ascertained; and if that were so, that would properly be dead freight within the ordinary meaning of the term, and the lien being given in terms for dead freight, that case would be within the recognized rule." That shews that Brett J. thought that the claim in *McLean* v. *Fleming* (2) was really a claim for liquidated damages. And that was apparently also the view of all the other judges who agreed with him in holding that dead freight did not include unliquidated damages. They did not say that they were not bound by the decision because it was a Scotch case. They all treated it as binding upon them if it could not be distinguished, but they thought it was distinguishable. What note of the case of *McLean* v. *Fleming* (2) the judges had seen does not appear, but I think it is plain that they had not seen a full and complete report of it. It is impossible to read the report of *McLean* v. *Fleming*, as reported in the *Law Reports* (2) and in a note at the end of *Gray* v. *Carr* (4), without seeing that the House of Lords dealt with the question whether dead freight included a claim for unliquidated damages for breach of contract in not shipping a complete cargo. They dealt with it expressly. Lord Chelmsford said: "This case can hardly be considered to be one of unliquidated damages, because the master, not having brought home any other goods than those of the appellants, the proper measure of the shipowner's claim appears to be the amount

(1) L. R. 6 Q. B. 522.
(2) L. R. 2 H. L. Sc. 128.
(3) L. R. 6 Q. B. at p. 541.
(4) L. R. 6 Q. B. at p. 558.

of the agreed freight which he would have earned upon the deficient quantity of 210 tons of bones." That at any rate only means that, as the facts turned out in that case, it was very easy to estimate the damages. There was no deduction to be made in respect of any cargo which the shipowner had found to fill up the empty space. I do not think that that would make the damages any the less unliquidated, but it might make the ascertainment of them extremely simple. Then Lord Chelmsford goes on: "But whether the amount of his damages is to be regarded as ascertained or not I am of opinion that the charterparty gives him a lien for his claim on account of the deficient cargo." Therefore Lord Chelmsford plainly holds that whether it is liquidated or unliquidated damages it is included in the expression "dead freight." Lord Westbury's judgment is equally plain. He says: "What is the meaning of the term 'dead freight' in respect of the remedy which it gives the shipowner? Does it entitle him to say that the deficient quantity shall be paid for at the rate assigned per ton in the charterparty? I think that would be a very unreasonable interpretation; for if the full freight had been furnished to the captain, the charge for loading and the other outlays attendant upon the additional 210 tons which were wanting, would have occasioned some expenditure to the shipowner. The result therefore is that, in a charterparty giving no specific sum as the amount to be recovered by way of compensation for dead freight, the shipowner becomes entitled only to a reasonable sum, which is another phrase for unliquidated damages." Lord Westbury therefore held that dead freight includes unliquidated damages, and the remaining Lord, Lord Colonsay, was of the same opinion. Therefore I ought not to overlook the fact that the Exchequer Chamber, when saying that *McLean* v. *Fleming* (1) was distinguishable, had not the full facts or the full judgments in that case before them. If they had I do not think they could have said what they did say. The reason for distinguishing the cases therefore being based upon a misapprehension, I must disregard *Gray* v. *Carr* (2), and consider myself bound by the decision in *McLean* v. *Fleming* (1) to hold that the lien given by

(1) L. R. 2 H. L. Sc. 128. (2) L. R. 6 Q. B. 522.

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the charterparty in this case and imported into the bills of lading covers the plaintiffs' claim.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Botterell & Roche.*

Solicitors for defendants: *Trinder, Capron & Co.*

J. F. C.

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May 26.

TAYLOR *v.* PRITCHARD.

Fishery Acts—Water Bailiff—Powers of—Right to search Suspected Person's Pocket—"Bag or other instrument used in carrying fish"—Salmon Fishery Act, 1873 (36 *&* 37 *Vict. c.* 71), *s.* 36, *sub-s.* 3.

By s. 36 of the Salmon Fishery Act, 1873, "Any water bailiff appointed under the Salmon Fishery Acts, 1861 to 1873, acting within the limits of his district may . . . . (3.) Search and examine all nets, baskets, bags, or other instruments used in fishing or in carrying fish by persons whom there is reasonable cause to suspect of having possession of fish illegally caught"; and any person refusing to allow such a search is to be liable to a penalty.

On the hearing of an information against the respondent for a refusal to allow his pocket to be searched under the above section the justices found that the pockets of men's coats were frequently used for the purpose of carrying fish:—

Held that, having regard to that finding, the respondent's pocket was a "bag or other instrument" within the meaning of the section.

CASE stated by justices of Monmouthshire.

An information was preferred against the respondent Pritchard, a labourer, charging that he on February 27, 1910, in the parish of Llanfoist, being a place within the Usk Fishery District, unlawfully refused to allow the appellant, then being a water bailiff duly appointed under the Salmon Fishery Acts, 1861 to 1907, for the said district, to search and examine a certain instrument, to wit, a pocket of a coat used for carrying fish by him, whom the appellant had reasonable cause to suspect of having possession of certain fish illegally caught, contrary to s. 36, sub-s. 3, of 36 & 37 Vict. c. 71.

At the hearing the following facts were proved:—

The appellant is and was on February 27, 1910, a water

bailiff for the Usk Fishery District duly appointed under s. 27 of 28 & 29 Vict. c. 121 by the Board of Conservators of the said district. At 10.15 P.M. on the day in question the appellant was on a public highway in the parish of Llanfoist, within the said district, and about 300 or 400 yards from the river Usk. The respondent came along the road and passed the appellant, whose attention was attracted owing to the respondent's pockets looking bulky. The appellant had reasonable cause to suspect the respondent of having possession of fish illegally caught and he did so suspect him. The appellant followed the respondent and asked him to let him see what the respondent had got in his pockets. At the same time the appellant duly produced and read his warrant of appointment as a water bailiff. In answer to the appellant's request the respondent said that the appellant had no right to search him on the public highway and refused to allow him to search him. Some slight scuffling then took place, the appellant endeavouring to search the pockets of the respondent and the respondent resisting. In the course of the scuffle a fishing rod, which was in several short pieces, was taken out of the respondent's pocket. After a little scuffling had taken place the respondent permitted the appellant to search his pockets, which he did, and searched all his pockets. In an inside coat pocket (not a detachable pocket, but an ordinary pocket inside the respondent's coat) the appellant found a canvas satchel bag with a strap, such as is usually used for carrying fish. There were no fish in the bag nor in the respondent's pockets, and both the bag and pockets were dry and shewed no signs of having been used for carrying fish on the day in question. The respondent was not then in possession of any fish illegally caught. The appellant deposed (and the justices found as a fact) that in several instances (in other cases) the pockets of a coat had been used by fishermen and also by persons having possession of fish illegally caught for the purpose of carrying fish.

The justices held that s. 36, sub-s. 3, of the Salmon Fishery Act, 1873, did not give a water bailiff power to search the person of suspected persons, that none of his pockets were bags or other instruments within the meaning of that section, and that the

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respondent was therefore justified in resisting the search. They accordingly dismissed the information subject to a case for the opinion of the Court.

Hon. H. C. Bailey, for the appellant. The justices ought to have convicted. They were no doubt influenced in their decision by a case of *Jones* v. *Owens* (1) to which their attention was called, and in which it was held that a search of the suspected person's pocket was illegal. But that case turned on the Salmon Fishery Act, 1865, under which the powers of search by water bailiffs were more limited, being confined to "boats nets baskets and other instruments used in fishing." Under the Act of 1873 there is power to search bags and other instruments used in carrying fish. The justices found that pockets are so used. Therefore the case comes directly within the words of the Act.

No counsel appeared on the other side.

LORD ALVERSTONE C.J. I am of opinion that the case must go back to the justices with directions to convict. The earlier Act of 1865 gave the water bailiffs no power to search anything except instruments used in fishing, which a pocket obviously is not. But that power is now extended to instruments used in carrying fish, and the justices have found as a fact that pockets are ordinarily so used by fishermen. That is enough. They ought to have held that the appellant had a right to search the respondent's pocket.

CHANNELL and LORD COLERIDGE JJ. concurred.

Appeal allowed.

Solicitors for appellant: *Herbert Smith, Goss, King & Gregory, for Lyne & Co., Newport, Mon.*

(1) (1870) 34 J. P. 759.

J. F. C.

P. & A. HODDELL, Appellants *v.* PARKER, Respondent. 1910] *May* 25.

Highway—Locomotive — Licence — Exemption — "Agricultural locomotive"— Locomotive used solely for Agricultural Purpose—Hauling Wheat to Mill to be ground—Locomotives Act, 1898 (61 & 62 *Vict. c.* 29), *s.* 9, *sub-ss.* 1, 9; *s.* 10; *s.* 17.

By s. 9, sub-s. 1, of the Locomotives Act, 1898, every locomotive to which the Act applies shall be licensed by a county council, provided that this enactment shall not apply to any agricultural locomotive, to any locomotive not used for haulage purposes, to any steam roller, or to any locomotive belonging to a road authority when used by them within their district. By s. 17, the expression "agricultural locomotive" includes "any locomotive used solely for threshing, ploughing, or any other agricultural purpose."

A threshing engine was let out on hire by the appellants to a farmer to thresh wheat and to haul the wheat, when threshed, in trucks to a mill to be ground. There was no evidence as to whether the farmer had sold the wheat or whether it was to be returned to the farm when ground. The trucks were the property of the appellants:—

Held, that the engine, when being used for hauling the wheat to the mill, was not being used for an agricultural purpose, and was therefore at the time not an agricultural locomotive within the exemption in s. 9, sub-s. 1, of the Act.

Case stated by justices for the borough of Monmouth.

An information was preferred by the respondent against the appellants for that they on September 6, 1909, did unlawfully cause a traction engine to be used on a certain highway in the borough of Monmouth without having paid the fee to the county council of Monmouthshire, the said engine not being licensed by the said council, as required by s. 9, sub-s. 9 (1), of the Locomotives Act, 1898.

(1) 61 & 62 Vict. c. 29, s. 9, sub-s. 1: "Every locomotive shall be licensed by a county council, provided that this enactment shall not apply to any agricultural locomotive, to any locomotive not used for haulage purposes, to any steam roller, or to any locomotive belonging to a road authority when used by them within their district."

Sub-s. 9: "A locomotive shall not be used on any highway in a county in which it is not licensed, except on payment to the council of the county of a fee not exceeding two shillings and sixpence for each day on which it is so used."

Sect. 10, sub-s. 1: "All locomotives not required to be licensed under this Act shall be registered in the county

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On September 6, 1909, the appellants caused a threshing engine to be used on a highway in the borough of Monmouth for hauling wheat in trucks under the following circumstances:—The engine had been hired from the appellants to thresh and haul, when threshed, to a mill in the borough of Monmouth belonging to Messrs. Courteen certain wheat the property of one Jones, a farmer in Herefordshire. The wheat was threshed by the engine and then hauled by it in trucks to the mill for the purpose of being ground. The engine was registered as an agricultural locomotive for threshing by the county council of Herefordshire in accordance with s. 10 of the Locomotives Act, 1898.

It was contended on behalf of the appellants that the engine was an agricultural locomotive within the meaning of s. 9, sub-s. 1, of the Locomotives Act, 1898; that s. 9, sub-s. 9, of the Act did not apply to such a locomotive; and that therefore the appellants were not liable to pay the fee to the county council of Monmouthshire as alleged in the information.

The justices were of opinion that the appellants did unlawfully use the engine contrary to s. 9, sub-s. 9, of the Act, and convicted them.

The question for the opinion of the Court was whether upon the above facts the justices came to a correct decision in point of law.

When the case came originally before the Court it was referred back to the justices upon two questions of fact, and they added the two following findings:—(1.) The trucks were the property of the appellants. (2.) No evidence was given as to whether the wheat was sold or was to be returned to the farm.

E. B. Charles, for the appellants. This engine was being used for an agricultural purpose within the meaning of s. 17 of the

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in which they are ordinarily used or to be used in such manner as the county council may direct."

Sect. 17, sub-s. 1: "In this Act, unless the context otherwise requires . . . . the expression 'agricultural locomotive' includes—(*a*) any locomotive used solely for threshing, ploughing, or any other agricultural purpose . . . ."

Sub-s. 2: "Nothing in this Act shall affect light locomotives within the meaning of the Locomotives on Highways Act, 1896."

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Locomotives Act, 1898, and was therefore an "agricultural locomotive" within s. 9, sub-s. 1, and as such was exempt from the fee imposed by sub-s. 9. The engine was let out on hire by the appellants to a farmer under what is known as a threshing and hauling contract. It was being used for hauling the wheat from the farm to the mill so as to enable the wheat to be ground. Sect. 9, sub-s. 1, was passed in relief of agriculture, and the expression "agricultural purpose" in s. 17 ought not to receive a narrow meaning as being limited to some purpose connected with the act of production in agriculture. It includes the disposal of agricultural produce and its manipulation for the market. Hauling wheat to a mill to be ground for the purpose of selling it as flour, or hauling wheat to the market for sale, is an agricultural purpose within the meaning of the Act. The sale of the wheat is essential to the conduct of the farm as a business, as it would be of no benefit to the farmer to produce wheat if he could not sell it. There are many agricultural purposes besides the two of threshing and ploughing expressly mentioned in s. 17, and the hauling here, which was done under a single contract of threshing and hauling, was sufficiently connected with agriculture to make it an "agricultural purpose." A locomotive which is let out on hire to a farmer for the purpose of hauling manure to his farm is, while so hauling, being used for an agricultural purpose: *Ellis & Co.* v. *Hulse*. (1) That was a decision under s. 32 of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), which is not so wide in its language as s. 17 of the Act of 1898. The exemption in s. 9, sub-s. 1, therefore applies, and the conviction was wrong.

C. A. Montague Barlow, for the respondent, was not called upon.

LORD ALVERSTONE C.J. The case as originally stated by the justices was sent back to them because it was suggested on behalf of the appellants that the trucks in which the wheat was being hauled might have belonged to the farmer, and that it might have been intended to take the wheat, when it was ground, back to the farm, the latter suggestion, I must say, not being a very probable one in the case of wheat. The

(1) (1889) 23 Q. B. D. 24.

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justices now state that the trucks were the property of the appellants, and that no evidence was given as to whether the wheat was sold or was to be returned to the farm. In these circumstances the appellants' contention is that the locomotive, when hauling the wheat under the contract with the farmer to the mill to be ground, it not being known whether the wheat was sold or was to be returned to the farm, was being used for an agricultural purpose within the meaning of the Locomotives Act, 1898. Sect. 9, sub-s. 1, of the Act provides that "every locomotive shall be licensed by a county council, provided that this enactment shall not apply to any agricultural locomotive, to any locomotive not used for haulage purposes, to any steam roller, or to any locomotive belonging to a road authority when used by them within their district." Then by sub-s. 9, " a locomotive shall not be used on any highway in a county in which it is not licensed, except on payment to the council of the county of a fee not exceeding two shillings and sixpence for each day on which it is so used." Sect. 17 says that " the expression ' agricultural locomotive ' includes (*a*) any locomotive used solely for threshing, ploughing, or any other agricultural purpose." There are a considerable number of agricultural purposes which are not included in the words threshing or ploughing, as, for instance, the hauling of manure to a farm, the hauling of crops from one part of the farm to another, the hauling of roots to be cut up for the purpose of feeding cattle, and, it may be, the hauling of corn from a place on the farm to the threshing machine, and taking it, after it has been threshed, back to the same farm or to another farm. In the present case all we know is that the appellants let out their engine under a contract which is called a threshing and hauling contract. It is a contract whereby in addition to the threshing, which is expressly stated in the Act to be an agricultural purpose, the appellants undertook to haul the wheat in trucks of their own along the road to the mill to be ground, and it might include the hauling of the wheat to the market to be sold. The appellants' counsel very properly admitted that he must contend that hauling the wheat to market to be sold is an agricultural purpose, because the farmer must sell the

produce of his farm in order to provide the means to carry on the business of farming. In my opinion that is not an agricultural purpose. Hauling the wheat to the mill to be ground or to market to be sold cannot, in my opinion, be said to be an agricultural purpose so as to entitle the appellants, who supplied the locomotive and trucks under the contract with the farmer, to escape payment of the fee. The appellants' locomotive was hauling for a purpose not shewn to be an agricultural purpose within the meaning of s. 17, and the appeal must therefore be dismissed.

CHANNELL and LORD COLERIDGE JJ. agreed.

Appeal dismissed.

Solicitors for appellants: *Joynson-Hicks, Hunt, Moore & Cardew.*

Solicitors for respondent: *Taylor, Rowley, Lewis & Davis.*

W. F. B.

FLOWER, APPELLANT *v.* WATTS, RESPONDENT.

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May 25.

Wild Birds—Live Larks recently taken—Prohibition against "killing or taking" Larks in County of London—Possession of Larks lawfully taken in another County—Wild Birds Protection Acts, 1880 (43 & 44 *Vict. c.* 35), *ss.* 3, 8, *and* 1881 (44 & 45 *Vict. c.* 51), *s.* 1—*Wild Birds Protection (Administrative County of London) Order*, 1909, *art.* 4.

By s. 3 of the Wild Birds Protection Act, 1880, any person who between March 1 and August 1 in any year shall knowingly and wilfully shoot or attempt to shoot, or shall use any boat for the purpose of shooting or causing to be shot, any wild bird, or shall use any lime, trap, snare, net, or other instrument for the purpose of taking any wild bird, or shall expose or offer for sale or shall have in his control or possession after March 15 any wild bird recently killed or taken, shall be liable to a penalty. By s. 8, a Secretary of State may "by order extend or vary the time (in any county) during which the killing and taking of wild birds or any of them is prohibited by this Act." By s. 1 of the Wild Birds Protection Act, 1881, a person shall not be liable to be convicted under s. 3 of the Act of 1880 of exposing or offering for sale, or having the control or possession of, any wild bird recently killed, if he

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satisfies the Court that the killing of the wild bird, if in a place to which the Act extends, was lawful at the time when and by the person by whom it was killed, or that the wild bird was killed in some place to which the Act does not extend.

A Secretary of State made an order under s. 8 of the Act of 1880, applicable to the county of London, extending the time during which the "killing or taking" of certain wild birds, including larks, was prohibited to the whole of the year:—

Held, that the words "killing and taking" in s. 8 of the Act of 1880 include all the offences specified in s. 3, and that therefore, by virtue of the order, it is made an offence for a person to have in his possession or control in the county of London at any time of the year live larks which have been recently taken, though they may have been taken in a place where it is lawful to take them.

CASE stated by a metropolitan police magistrate.

A complaint was preferred by the respondent, an inspector of the Royal Society for the Prevention of Cruelty to Animals, against the appellant, a dealer in birds, for that he on November 12, 1909, at Sclater Street, Shoreditch, in the county of London, did knowingly and wilfully have in his possession certain wild birds, to wit, thirty-six larks, the same being recently taken, contrary to the provisions of s. 3 of the Wild Birds Protection Act, 1880, and the Wild Birds Protection (Administrative County of London) Order, 1909.

At 8.35 P.M. on November 11, 1909, a case containing thirty-six live larks arrived at Liverpool Street Station from Barnwell Junction, Cambridgeshire, consigned to the appellant. The appellant admitted to the respondent on the following day that he had sold some of the larks, whilst the others were in a cage in his window. The larks had been freshly caught in Cambridgeshire.

The Wild Birds Protection (Administrative County of London) Order, 1909, made by the Home Secretary on July 17, 1909, in pursuance of the powers conferred upon him by the Wild Birds Protection Acts, 1880 to 1908 (1), and upon application by the

(1) Wild Birds Protection Act, 1880 (43 & 44 Vict. c. 35), s. 3: "Any person who between the first day of March and the first day of August in any year after the passing of this Act shall knowingly and wilfully shoot or attempt to shoot, or shall use any boat for the purpose of shooting or causing to be shot, any wild bird, or shall use any lime, trap, snare, net, or other instrument for the purpose of taking any wild bird,

county council of the administrative county of London, prohibited the killing or taking of certain species of wild birds, including larks, throughout the administrative county of London

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or shall expose or offer for sale, or shall have in his control or possession after the fifteenth day of March any wild bird recently killed or taken, shall on conviction of any such offence before any two justices of the peace . . . . in the case of any wild bird which is included in the schedule hereunto annexed, forfeit and pay for every such bird in respect of which an offence has been committed a sum not exceeding one pound, and in the case of any other wild bird shall for a first offence be reprimanded and discharged on payment of costs, and for every subsequent offence forfeit and pay for every such wild bird in respect of which an offence is committed a sum of money not exceeding five shillings, in addition to the costs, unless such person shall prove that the said wild bird was either killed or taken or bought or received during the period in which such wild bird could be legally killed or taken, or from some person residing out of the United Kingdom . . . ."

Sect. 8 gives power to a Secretary of State, upon the application of the justices in quarter sessions of any county (now, by s. 3, sub-s. (xiii.), of the Local Government Act, 1888, the county council), by order to "extend or vary the time during which the killing and taking of wild birds or any of them is prohibited by this Act; after the making of which order the penalties imposed by this Act in respect of such wild birds shall in such county apply only to offences committed during the time specified in such order."

The schedule to the Act did not include larks.

Sect. 1 of the Wild Birds Protection Act, 1881 (44 & 45 Vict. c. 51), repeals the above exception in s. 3 of the Act of 1880 (from the word "unless" down to the words "United Kingdom"), and in lieu thereof the following enactment is to have effect: "A person shall not be liable to be convicted under s. 3 of the Wild Birds Protection Act, 1880, of exposing or offering for sale, or having the control or possession of, any wild bird recently killed, if he satisfies the Court before whom he is charged either (1.) that the killing of such wild bird, if in a place to which the said Act extends, was lawful at the time when and by the person by whom it was killed; or (2.) that the wild bird was killed in some place to which the said Act does not extend, and the fact that the wild bird was imported from some place to which the said Act does not extend shall, until the contrary is proved, be evidence that the bird was killed in some place to which the said Act does not extend."

Sect. 2: "The schedule to the Wild Birds Protection Act, 1880, shall be read and construed as if the word 'lark' had been inserted therein."

The Wild Birds Protection (Administrative County of London) Order, 1909, art. 2: "The time during which the killing or taking of wild birds is prohibited by the Act of 1880 shall be extended, so far as concerns the administrative county of London, so as to be

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during the whole of the year. The Wild Birds Protection (County of Cambridge) Order, 1907, made by the Home Secretary in pursuance of the powers conferred upon him by the Wild Birds Protection Acts, 1880 to 1904, and upon application by the county council of the administrative county of Cambridge, which prohibited the killing or taking of certain species of wild birds during the whole of the year, did not include larks.

It was contended on behalf of the appellant that, inasmuch as the larks were caught and taken in an area where the taking of such birds was lawful, no offence had been committed by the appellant against the provisions of the Order of 1909, which did not apply to birds lawfully taken outside the administrative county of London, and the magistrate's attention was drawn to the Wild Birds Protection Act, 1881. It was contended on behalf of the respondent that the Order of 1909 made it an offence for a person in London to have in his possession any wild bird recently taken, mentioned in art. 4 of the Order of 1909, notwithstanding the fact that the taking of the bird was lawful in itself in the district where it was caught, and that the provisions of the Wild Birds Protection Act, 1881, did not apply to the possession of live birds.

The magistrate was of opinion that the contention of the respondent was correct, and convicted the appellant and imposed a fine of 10*s.* and ordered him to pay 2*s.* costs.

The question for the opinion of the Court was whether the magistrate came to a correct decision in point of law.

Kenelm Preedy, for the appellant. The prohibition contained in art. 4 of the Wild Birds Protection (Administrative County of London) Order, 1909, which was made under s. 8 of the Wild Birds Protection Act, 1880, against killing or taking the wild

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between the 31st day of January and the 1st day of September in any year."

Art. 4: "During the period between the 31st day of August in any year and the 1st day of February following the killing or taking of any of the following species of wild birds is prohibited throughout the administrative county of London." Then follows a list of birds, including the lark.

birds, including larks, specified therein, does not include all the offences specified in s. 3 of the Act. Sect. 8 gives a Secretary of State power by order to extend or vary the time during which the "killing and taking" of wild birds or any of them is prohibited by the Act. Sect. 3 divides the offences for which penalties are imposed into three distinct classes: (1.) killing any wild bird; (2.) taking any wild bird; and (3.) exposing or offering for sale or having in his control or possession any wild bird recently killed or taken.

The words "killing or taking" in the order only apply to the first two classes of offences, and not to the third class. Larks have been added to the schedule of the Act of 1880 by s. 2 of the Wild Birds Protection Act, 1881. The Wild Birds Protection (County of Cambridge) Order, 1907, does not include larks, and therefore these larks were lawfully taken in Cambridgeshire, as they are not taken during the close time for larks in that county. The appellant did not commit an offence in having these larks in his control or possession in the county of London during the extended time specified in the order therein. If the larks had been killed before having been sent to London, s. 1 of the Act of 1881 would have protected the appellant. It is impossible to conceive any reason why the exposing or offering for sale or having the control or possession of live larks in London should be an offence, when it is not an offence in the case of dead larks. The conviction was therefore wrong.

Stuart Bevan, for the respondent. The order, which follows the wording of s. 8 of the Wild Birds Protection Act, 1880, by art. 2 extends the time during which the killing or taking of wild birds generally is prohibited so as to be between January 31 and September 1 in each year, and by art. 4 it further extends the time during which the killing or taking of certain specified wild birds, including larks, is prohibited so as to cover the rest of the year. The words "killing or taking" include all the offences specified in s. 3 of the Act, and therefore the fifteen days of grace allowed by s. 3 for exposing or offering for sale or having control or possession of live wild birds are done away with. Sect. 3, which contains the prohibition as to killing or taking wild birds,

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does not in terms provide that killing or taking shall be an offence. The words "killing or taking" ought not to be construed strictly, for if they were the offence of attempting to shoot a wild bird would not be included in the order, though if the attempt was successful and the bird was killed it would be covered by the order. Nor would the offence of using any lime, trap, &c., for the purpose of taking any wild bird be within the order if the bird was not actually taken. The true construction of s. 8 is to read it as applying to all the offences specified in s. 3, and this view is strengthened by the provision in s. 8 that the penalties imposed by the Act in respect of such birds shall apply to offences committed during the time specified in the order. That would seem to refer to penalties for any of the offences specified in s. 3. Moreover, s. 8 gives power to vary as well as to extend the time. Supposing that an order was made under s. 8 varying the time specified in s. 3 by shortening it and substituting July 1 for August 1, if the contention of the appellant is correct it would not be an offence to take a live wild bird included in the order within the county of London in July, though it would be an offence for a person to have such a wild bird, lawfully taken within the county of London in July, in his control or possession during that month. The Court will not, unless compelled to, place a construction upon the Act which would lead to such an absurd result. The fact that the bird has been lawfully taken does not affect the question. The offence is for a person to expose or offer the live bird for sale or to have it in his control or possession. If the larks here had been killed before being sent to London, s. 1 of the Wild Birds Protection Act, 1881, would have made it no offence to expose or offer them for sale or to have control or possession of them in London. The Legislature may have drawn the distinction between live wild birds and dead ones for the purpose of enabling the latter, if killed at a place where it was lawful to kill them or at a place to which the Act does not extend, to be sent to London for the purposes of food. But if the wild birds specified in the order have been recently taken anywhere they must not be brought alive to London. [He referred to *Taylor* v. *Rogers*. (1)]

(1) (1881) 50 L. J. (M.C.) 132.

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Kenelm Preedy in reply. Sect. 8 only gives power to extend or vary the time during which the killing and taking of wild birds is prohibited. If "taking" a wild bird includes the offence of having the control or possession of a live wild bird, then there were two takings of the larks in the present case, namely, one in Cambridgeshire and the other in London. If the word "taking" has that meaning, the indirect result of the London order will be to protect larks in Cambridgeshire by preventing them from being brought alive to London.

LORD ALVERSTONE C.J. The question raised in this case is one of considerable difficulty. The appellant was summoned for knowingly and wilfully having in his possession in the county of London on November 12, 1909, thirty-six larks, the same having been recently taken. The larks had been caught in the county of Cambridge, where they might lawfully be caught, and the question is whether or not it was an offence for the appellant to have in his possession in the county of London live larks which had been recently lawfully caught. Sect. 3 of the Wild Birds Protection Act, 1880, makes it an offence for a person, between March 1 and August 1 in any year, to knowingly and wilfully shoot or attempt to shoot, or to use any boat for the purpose of shooting or causing to be shot, or to use any lime, trap, snare, net, or other instrument for the purpose of taking, any wild bird, or to expose or offer for sale or to have in his control or possession after March 15 any wild bird recently killed or taken. Sect. 8 provides that a Secretary of State may, upon application by any county council, "by order extend or vary the time during which the killing and taking of wild birds or any of them is prohibited by this Act; after the making of which order the penalties imposed by this Act in respect of such wild birds shall in such county apply only to offences committed during the time specified in such order." It is material to point out that the section provides for the variation as well as the extension of the close time, and therefore it includes the power to shorten as well as the power to extend the time.

It is contended on behalf of the appellant that there is no power under s. 8 to extend or vary the time with regard to

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the particular offences specified in s. 3, which he alleges are not those of killing and taking. The taking of a wild bird is not specifically mentioned in s. 3 as an offence against that section. It is made an offence to use any lime, trap, snare, net, or other instrument for the purpose of taking any wild bird, but the actual taking as distinct from the acts which bring about, or are intended to bring about, the taking is not mentioned. If the appellant's argument were correct this strange result would follow, as has been pointed out in the course of the argument, that, if the time for killing and taking wild birds was varied by shortening the close time, it would be an offence for a person to expose or offer for sale or to have in his control or possession during any part of the original time a live wild bird recently taken, though it would be no offence to take the bird during that part of the original time which was not included in the time as varied. It seems to me that s. 8 deals in a compendious manner with the offences specified in s. 3, and when it provides for an extension or variation in any county of the time during which the killing and taking of wild birds is prohibited by the Act it includes all the offences specified in s. 3, making the offences specified in that section offences in the extended or varied time, with the effect, as s. 8 provides, that the penalties imposed by the Act in respect of such wild birds as the order includes shall in such county apply only to offences committed during the time specified in such order. That being so, the Wild Birds Protection (Administrative County of London) Order, 1909, applies so as to protect larks in the county of London, and makes it an offence for a person to expose or offer for sale, or to have in his control or possession, live larks during any period of the year, wherever they may have been taken. It is suggested that the repeal of the words in s. 3 of the Act of 1880—" unless such person shall prove that the said wild bird was either killed or taken or bought or received during the period in which such wild bird could be legally killed or taken, or from some person residing out of the United Kingdom "—and the substitution of the provisions of s. 1 of the Wild Birds Protection Act, 1881, create a difficulty inasmuch as the substituted enactment only applies to dead and not to live

birds. It seems to me quite possible that s. 1 of the Act of 1881 was intended to extend the exception as to the exposing or offering for sale or having the control or possession of a dead wild bird, provided it could be proved that the bird was, if I may use the expression for brevity, lawfully killed, while at the same time it was intended to abolish the exception in the case of live wild birds. The Legislature thus affords still further protection to live wild birds, while it allows a person to expose or offer for sale or to have in his control or possession a dead wild bird, provided he can prove one or other of the conditions specified in the section. In my opinion, therefore, under the Act of 1880 and the Order of 1909 it is an offence for a person to expose or offer for sale, or to have in his control or possession, in the county of London at any period of the year live larks which have been recently taken anywhere. These larks no doubt were lawfully caught in Cambridgeshire, inasmuch as the Order of 1907, which applies to that county, does not extend the time specified in the Act of 1880 during which the taking of larks is made an offence. It may seem somewhat anomalous that larks which are caught in Cambridgeshire cannot be sent alive into the county of London, whereas if they are first killed they can under the provisions of s. 1 of the Act of 1881 be sent into the county of London. We have, however, simply to construe the Acts and the order. The appellant therefore committed an offence in having in his possession in the county of London these live larks which had been recently taken. For these reasons I think that the decision of the magistrate was right and that the appeal should be dismissed.

CHANNELL J. I have very great difficulty in interpreting this legislation. It seems to me that the amendment which has been introduced into s. 3 of the Wild Birds Protection Act, 1880, by s. 1 of the Wild Birds Protection Act, 1881, makes it almost impossible to understand the Act, which even before the amendment was somewhat difficult to understand. My Lord has succeeded in extracting an intelligible meaning out of the words used, and I do not differ from him in the way in which he has done so, though

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I am afraid that, if left to myself, I should not have been able to do it.

LORD COLERIDGE J. I agree.

Appeal dismissed.

Solicitors for appellant: *Lewis Margetts & Co.*
Solicitor for respondent: *S. G. Polhill.*

W. F. B.

C. A.

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May 3, 4, 12.

[IN THE COURT OF APPEAL.]

DOGGETT *v.* WATERLOO TAXI-CAB COMPANY, LIMITED.

Employer and Workman—Compensation—Taxi-cab Driver—"Workman"—"Contract of Service"—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *ss.* 1, 13.

The driver of a taxi-cab while using it sustained injuries from the effects of which he died. His widow claimed compensation under the Workmen's Compensation Act, 1906, against the respondents, a company, who owned the cab. The company's drivers were paid a percentage of the takings registered by the taximeters of the cabs. When a driver took out a cab from the yard he went where he pleased and kept the cab, sometimes until the next day or for several days, and, except by refusing to let a driver have a cab the next time he applied for one, the company had no control over and could not dismiss him:—

Held, that the relation between the company and the deceased driver was not that of master and servant, and that the claimant was not entitled to compensation.

APPEAL from an award of the judge of the Southwark County Court upon a claim for compensation under the Workmen's Compensation Act, 1906.

The claimant was the widow of a deceased taxi-cab driver who had obtained a cab from the respondent company and had died from the effects of an accident which he sustained in the course of using the cab. From the facts as found by the county court judge it appeared that it was the practice for a driver when taking out a cab from the respondents' yard to sign a printed hiring sheet in the following terms:—"I, the undersigned, hereby declare that I have taken out the cab bearing

the above number in good condition with full kit of tools, tariff and police plates properly affixed, and with my badge and licence. I will be personally responsible for any violation of the police regulations." Below was space for a summary of the taximeter totals. At the end of the day, or next morning, if the cab came in late, the totals registered by the taximeter were entered in these spaces by a clerk of the company, and three-fourths of the takings so recorded were paid by the driver to the owner, and the remaining fourth, subject to a deduction for the petrol used, belonged to the driver. He received no wages. When a driver left the yard he went where he pleased and as far as he pleased, and kept the taxi-cab out, sometimes until the next day or for several days. It was admitted that, except by refusing to let a driver have a cab the next time he applied for one, the company had no control over the man and could not dismiss him. There was, however, some evidence to the effect that a notice was exhibited in the respondents' yard stating that "drivers not duly noting up 'extras' would be discharged."

The county court judge upon these facts held that the deceased was a daily servant of the company and awarded the applicant 249*l.* by way of compensation.

The company appealed.

Norman Craig, K.C., and *Ellis Hill*, for the appellants. The only question raised by this appeal is what is the relation between the driver of this taxi-cab and the proprietors; does the driver hire this cab as bailee, or is he the servant of the proprietors?

Taxi-cabs are, for all purposes, under the London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), just as the horsed cabs are. In the case of the horsed cabs the driver pays so much a day for his cab and makes what he can for himself; in the present case the driver pays 75 per cent. of his takings, as registered by the meter, to the proprietor and keeps 25 per cent., less the cost of petrol, for himself; but this change in the method of payment makes no difference in the relation of driver and proprietor; the latter has in neither case any control over the former as soon as he has left the yard.

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There is no contract of service in this case; the daily sheet on which the takings are set down from the meter does not amount to a contract. The driver is not obliged to take a taxi-cab every day and the proprietors are not bound to let him one.

The only case in which a taxi-cab driver has been held to be a servant of the proprietors is *Rex* v. *Solomons* (1), but that was a criminal case where the driver had been falsifying the meter, and the regulations as to hiring were different from the present case.

In the case of horsed cabs it has been decided that as between the driver and the proprietor the position is that of bailor and bailee, though as between the driver and the public, e.g., in the case of an accident, the driver is the servant of the proprietor so as to make him responsible for negligence by the driver: *Fowler* v. *Lock* (2); *Venables* v. *Smith.* (3) *King* v. *Spurr* (4), which seems to be to the contrary, has been practically overruled by *King* v. *London Improved Cab Co., Ld.* (5) and *Keen* v. *Henry* (6); see also *Gates* v. *R. Bill & Son.* (7)

There is no evidence here of any right in the proprietors to control the movements of the drivers, even in the yard, and the definition of "workman" presupposes a contract of service which gives a right of control.

[BUCKLEY L.J. referred to *Simmons* v. *Heath Laundry Co.* (8)]

The onus is on the applicant to prove some contract of service before compensation can be recovered.

Martin O'Connor, for the respondent. The appellants in order to succeed must shew that there is no evidence upon which the learned county court judge could properly find that the relation of master and servant existed. There is ample evidence here of a contract of service, both express and implied. The document signed by the driver is only consistent with a contract of service. Again, the method of remuneration by a percentage of the takings is not inconsistent with the relation of master and servant. The whole of the money received became the property of the employer,

(1) [1909] 2 K. B. 980.
(2) (1872) L. R. 7 C. P. 272.
(3) (1877) 2 Q. B. D. 279.
(4) (1881) 8 Q. B. D. 104.
(5) (1889) 23 Q. B. D. 281.
(6) [1894] 1 Q. B. 292.
(7) [1902] 2 K. B. 38.
(8) [1910] 1 K. B. 543.

and the learned county court judge said that if the driver kept it he could be indicted for embezzlement.

It has been held that a driver in this position is a servant: *Rex* v. *Solomons*. (1) The assumption of the right of dismissal is not consistent with any relation but that of master and servant.

In *Powles* v. *Hider* (2) it was held that the relation between the driver and the proprietor of a hackney carriage was that of master and servant and not that of bailor and bailee.

Norman Craig, K.C., in reply. There is no evidence of control on which the Court could find that there was a contract of service. A mere scintilla of evidence is not enough: *Fitzpatrick* v. *Evans*. (3) [He also referred to *Boon* v. *Quance*. (4)]

May 12. COZENS-HARDY M.R. The question in this appeal is whether the dependants of Doggett, the deceased driver of a taxi-cab, are entitled to compensation from the defendants, who are the owners of the taxi-cab, and the answer to the question depends solely upon the true legal relation between Doggett and the defendants. If it was a contract of service, as the learned county court judge held, the defendants are liable. If it was not a contract of service they are not liable. It must never be forgotten that our jurisdiction is limited to points of law, and that findings of fact by the county court judge acting as arbitrator are conclusive, subject to this important qualification, that if there was no evidence fit for the consideration of a jury to support the finding of fact it is competent to this Court, and it is the duty of this Court, to disregard the finding. Although I have called it a qualification, it is not really such, for in truth it is a question of law whether there is any evidence. I have anxiously considered the notes of the evidence and the very full judgment of the learned county court judge, and I have come to the conclusion that his finding cannot be supported.

The position of the driver of a taxi-cab is in most respects identical with the position of the driver of a horse cab. It has been held by a series of authorities by which we are bound that

(1) [1909] 2 K. B. 980.
(2) (1856) 25 L. J. (Q.B.) 331.
(3) [1902] 1 K. B. 505, 509.
(4) (1910) 3 Butterworth, 106.

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the relation of a proprietor of a horse cab and a driver is not in ordinary circumstances one of master and servant, although as between a member of the public injured through the negligence of the driver the proprietor is liable. The Statutory Rules and Orders dated December 30, 1907, apply to horse cabs and taxi-cabs alike. Sched. H gives a form of licence to act as driver of cabs, and there is a table with two columns which contain the words "proprietors' service" and "date of getting service." Those words have not been held in the case of horse cabs to evidence the relation of master and servant, and they have no greater effect in the case of taxi-cabs. The contract between the proprietor and the driver is only for the day on which the taxi-cab is taken out, as the learned judge finds. The driver is not bound to come the next day, and if he does come the proprietor is not bound to let him have a taxi-cab. He is not paid anything as wages. He is accountable to the proprietor for 75 per cent. of the takings, his own remuneration being a sum equal to 25 per cent. of the takings. This mode of remuneration tends against and not in favour of the view that he is a servant. The proprietor exercises no control over the driver, who can go when and where he pleases. The only written evidence of the terms of Doggett's contract is the taximeter sheet, and it does not in any way assist the plaintiffs. The learned judge seems to have been impressed by the fact that "instruction" was given to the driver as to the mode in which the taximeter must be worked. But this was necessary in order to ensure compliance with the statutory rules, as well as to secure the due ascertainment of the sum properly payable each day to the proprietor. It throws no light upon the question of control. The learned judge also attached weight to an alleged notice, not produced, and sworn to at a very late stage of the proceedings, that drivers not duly noting "extras" would be discharged or dismissed. But there is nothing to shew that this notice was put up before the accident. Moreover, it is not easy to see how there can be a dismissal or discharge of a person whose contract is for a day only.

In my opinion these various points do not suffice, either singly or collectively, to justify a finding that the relation between the

parties was a contract of service. The burden of proof rests upon the applicants and they have not discharged that burden. I think that the relation was that of bailment, although it may possibly be contended that the parties were co-adventurers.

In the above observations I have dealt only with the facts of this particular case. There may be cases in which the proprietor of a taxi-cab exercises such an amount of control over the driver as to justify the conclusion that the relation of master and servant exists. *Rex* v. *Solomons* (1) apparently furnishes an instance. In my opinion the appeal must be allowed.

BUCKLEY L.J. The question here is whether Doggett had entered into or worked under a contract of service or apprenticeship with the Waterloo Company. This question must be answered by investigating what was the contractual relationship between the two parties. Three views seem to me possible—first, bailment, including a locatio or hiring of the chattel; secondly, co-adventure; and thirdly, service. The learned judge has found that the contract was a contract of service. In my opinion there was no evidence to support that finding. The documentary evidence consists of the taximeter sheet which shews the account for the day between the cab company and the man. The language of it is that the driver has taken the cab. It contains an account of the sums received for the running of the cab and, after deduction of 25 per cent. as the driver's proportion, states the net amount due from him to be a certain sum to which is added the amount due from the man to the company for petrol. The whole account results in shewing an amount due from the driver. I am unable to find in this document anything to shew that the contract was one of service. It may shew a co-adventure, but I think preferably that it shews a bailment or hiring of the chattel, which, as the document states, has been taken by the man, and in respect of which taking an amount is due from him to the company. The other documentary evidence is the licence. The point made upon this document is that under the heading "Date when within named licensed person entered proprietors' service" there is an entry of a date. This

(1) [1909] 2 K. B. 980.

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is a form kept as required by 6 & 7 Vict. c. 86, s. 8, and 32 & 33 Vict. c. 115. No inference is, I think, to be drawn from the fact that the word "service" is used. The word is merely adopted from the language of the Act. It is an Act which applies whether the driver owns his cab or drives it under some contract with the owner. The mere use of the word "service" under these circumstances cannot determine the contract to be other than that which the other facts shew that it in fact was. The decisions as regards hackney carriages, being horse-drawn vehicles, shew that as between owner and driver the relation may be and prima facie is that of bailor and bailee and not that of master and servant: *Fowler* v. *Lock* (1); although so far as the general public are concerned the owner of the vehicle may be liable to the public as if the relation between the owner and driver were that which it is not, namely, the relation of master and servant: *Venables* v. *Smith* (2); *King* v. *London Improved Cab Co.* (3); *Keen* v. *Henry* (4); *Gates* v. *R. Bill & Son.* (5) The provisions of 6 & 7 Vict. c. 86 apply, of course, in all these cases, and the use under adoption from that Act of the word "service" cannot in the present any more than in those cases determine that the relation is that of master and servant if the facts shew that it was not.

Upon the facts in this case I can find nothing to shew that the owner retained over the driver of the cab any such control as would support the relation of master and servant. On the contrary there is a good deal of evidence the other way. The attempt which was made by recalling witnesses, Taylor and Brooks, to establish that a notice had been posted in the yard that drivers not noting up extras would be dismissed breaks down. It is not established that that notice was posted before December 31, which is the date of this accident, and even if it were the word "dismissal" would not in the facts of this case import a discharge from a current service. All the facts go to shew that the contract was one in which the driver took the cab for a time not exactly determined, which prima facie was a day but might, according to the custom of the yard, extend to more

(1) L. R. 7 C. P. 272.
(2) 2 Q. B. D. 279.
(3) 23 Q. B. D. 281.
(4) [1894] 1 Q. B. 292.
(5) [1902] 2 K. B. 38.

than one day within a reasonable time. Each time the man returned to the yard the contract, whatever it was, came to an end. It was renewed when he took the cab again the next morning. There was no position from which to dismiss within the proper meaning of that word.

The contract here was one of bailment. There was no contract of service. The appeal must be allowed upon the ground that there was no evidence to support the learned judge's finding.

KENNEDY L.J. In appeals under the Workmen's Compensation Act, when the issue is one of fact, this Court reverses the decision of the county court judge only in a case in which it is satisfied that if there had been a trial with a jury there was no evidence proper to submit to the consideration of the jury in support of the conclusion at which the county court judge has arrived. The question as to whether there is or is not any such evidence is a question of law. In the present case, after carefully considering the points which the learned county court judge has treated as being cumulatively sufficient to justify his conclusion, I feel myself obliged to hold that, if they are judged by the test which I have stated, they are insufficient.

It has been judicially settled that the driver of an ordinary horse cab in the metropolis is not, as between himself and the cab owner, a servant in the latter's employ. I cannot find any foundation for a distinction between the driver of the horse cab and the driver of the taxi-cab in the fact that, instead of paying a fixed sum for the right to use the cab, the driver of the taxi-cab pays a large proportion of what he receives to the proprietor. So far as any inference is to be drawn from this, it would, as it seems to me, rather be that the driver of the taxi-cab is a co-adventurer with the proprietor. It does nothing towards establishing the relation of master and servant between them. Again, in the case of horse cab and taxi-cab alike, the word "service" occurs in one column of the document called a licence, which in each case has, under police regulations and in accordance with the statute 32 & 33 Vict. c. 115, to be signed by the proprietor.

I can draw no inference of service from the fact that a taxi-cab driver commonly receives, to use the learned county court

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judge's words, "by way of loan" from the proprietor a coat or mackintosh or other dress with the proprietor's initials upon it, which the driver can use or not as he likes. It might—I do not say it would—have been a somewhat different thing if the driver had been bound to wear clothing in the nature of a uniform. Substantially, in my view, the test of the relation of master and servant is control. In the evidence, as summed up in the careful judgment by the learned county court judge himself, I see no evidence of this essential element: no evidence, e.g., that the company could have ordered the deceased to take this or that job, or start or return at this or that time. He seems to rely upon three things: (1.) instructions as to the use of the registering meter, which the deceased man promised to observe; (2.) a notice in the yard that if the cab driver did not observe those instructions he would be instantly dismissed, or words to that effect; (3.) that the taxi-cab driver must work the cab reasonably to obtain fares, and take reasonable care to keep the cab free from injury or damage. In regard to the first of these points there is nothing in the fact of instructions being given as to this method of using the meter in the least inconsistent with the relation of bailor and bailee, when the bailee is to pay over to the bailor a certain proportion (here 75 per cent.) of takings as registered upon the instrument. In regard to the second, if there ever was any such notice affixed to some part of the yard or garage during the deceased's driving (of which the evidence is rather unsatisfactory), it is of no moment whatever, if it is clear, as it is, that "dismissal" is an entirely inappropriate and misapplied word, because there was no definite term of service, the driver simply taking out the cab for the day, bringing it back at night, and either proprietor or driver, if he pleased, being entitled the next day to refuse to have any further relations with the other. In such circumstances the word "dismissal" is simply futile and meaningless, and its use (if it is so used) in the alleged notice of the cab proprietor cannot help the applicants to prove that the deceased was a servant. Its utmost efficacy would be that of a notice that hereafter the proprietor will not let the driver have one of his cabs to ply with. In regard to the third point, I have not myself been able to find evidence of any express agreement

between the deceased and the cab owners to the effect stated. But I will assume that, either expressly or impliedly, such an agreement or stipulation existed. It is at least quite as consistent with the relation of bailor and bailee as with that of master and servant.

I do not think I have omitted any of the matters upon which the judgment of the learned county court judge tells us that he relied in coming to his conclusions, and, with all due respect to him, I cannot find in the sum of them taken together any evidence to justify that conclusion. My present view is that the legal position of this taxi-cab driver was that of a bailee, hiring the cab on any day on which he agreed with the Waterloo Taxi-Cab Company, Limited, to take a cab for the day from them upon the terms of handing over to them 75 per cent. of the day's takings, calculated by a certain method, and of keeping only 25 per cent. for himself.

Reference was made in the course of the argument to a recent case of *Rex* v. *Solomons* (1), which came before the Court of Criminal Appeal after a trial at the Central Criminal Court. The proprietors of the taxi-cab in that case were not the same as those in the present case: evidence was given at considerable length in that case which was not given in the present case. No one asserts that the owner of a taxi-cab and its driver cannot possibly create between themselves the relation of master and servant; the question in each case as to whether they have or have not done so is a question of proof by evidence of the particular facts; and it appears to me that it would not be right or proper to introduce into our consideration of the present appeal either the verdict of the jury in *Rex* v. *Solomons* (1) or the judgment of the Court of Criminal Appeal which supported that verdict.

In my opinion the present appeal must be allowed.

Appeal allowed.

Solicitors for appellants: *Nordon & Drury.*
Solicitor for respondent: *C. F. Appleton.*

(1) [1909] 2 K. B. 980.

G. A. S.

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In re SMITH.
Ex parte WILSON.

Bankruptcy—Practice—Taxation—Trustee's Solicitor's Bill of Costs—Notice of Taxation not given to New Trustee—Retaxation after Allocatur signed —Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 73, *sub-s.* 3—*Bankruptcy Rules*, 1886 *and* 1890, *rr.* 120, 122.

Rule 120 of the Bankruptcy Rules, 1886 and 1890, provides that every person whose bill or charges is or are to be taxed shall in all cases give not less than seven days' notice of the appointment to tax the same to the official receiver and to the trustee (if any).

A trustee in bankruptcy passed his solicitor's bill of costs subject to taxation, and the solicitor lodged the bill with the taxing officer and obtained an appointment to tax. Before the date fixed for the taxation arrived a new trustee in bankruptcy was appointed, but the solicitor did not give notice of the appointment to tax either to the official receiver or to the new trustee, and the taxation proceeded in the presence of the solicitor only, and the taxing officer gave his allocatur for the amount of the taxed bill:—

Held, on the construction of the rule, that "the trustee" who ought to have had notice of the appointment to tax was the person who was trustee at the time when the taxation took place, i.e., the new trustee, and that notice should also have been given to the official receiver. A retaxation of the solicitor's bill was accordingly directed with liberty to the new trustee to attend, and in the meantime the allocatur was suspended.

This was an application to set aside the allocatur of a taxing Master and to obtain the retaxation of a taxed bill of costs in these circumstances.

In October, 1909, a receiving order was made against the debtor, and he was subsequently adjudicated a bankrupt. At the first meeting of his creditors, held in November, a Mr. Partridge was appointed the trustee with a committee of inspection. At this meeting a proof by a Mr. Valentine for some 2400*l.* was rejected by the official receiver for the purposes of voting. Subsequently the committee of inspection appointed Mr. Simmons, a solicitor, to act as solicitor to the estate in relation to certain matters. On March 1, 1910, Mr. Valentine's appeal against the rejection of his proof by the official receiver was allowed with costs. A new first meeting of creditors was then called at the instance of

Mr. Valentine for March 18. Due notice of this meeting was on March 10 sent to Mr. Partridge and Mr. Simmons, both of whom were creditors, but they did not attend the meeting. At this meeting the weight of Mr. Valentine's proof carried the appointment of a Mr. Wilson as trustee in the place of Mr. Partridge, with a new committee of inspection.

In the meantime, on March 15, Mr. Simmons delivered his bills of costs for work done as solicitor to the estate to Mr. Partridge, who passed them subject to taxation. The same day Mr. Simmons lodged his bills of costs with the taxing Master and obtained an appointment to tax for April 22, but he did not give notice of this appointment to tax either to the official receiver or to Mr. Wilson, nor did he inform the taxing Master that Mr. Wilson had been appointed the trustee in the place of Mr. Partridge, and the taxation proceeded on April 22 in the presence of Mr. Simmons only. A considerable sum was taxed off the bills, and ultimately the taxing Master gave his allocatur for some 403*l.* Mr. Simmons then applied to Mr. Wilson for payment of the amount of the allocatur out of the bankrupt's estate, but this he declined to do, and now applied that the allocatur might be set aside and that the bills of costs might be retaxed.

Tindale Davis, for the application. Having regard to rr. 120 and 122 of the Bankruptcy Rules, 1886 and 1890 (1), notice of the appointment to tax ought to have been given to Mr. Wilson, who was the trustee at the time the taxation took place, to give him the opportunity of attending the taxation and objecting to any items in the bills. Notice also should have been given to the official receiver. The solicitor really taxed his bills against himself. The 403*l.* will about absorb the whole of the assets.

(1) By the Bankruptcy Rules, 1886 and 1890, r. 120, "Every person whose bill or charges is or are to be taxed shall in all cases give not less than seven days' notice of the appointment to tax the same to the official receiver and to the trustee (if any)."

Rule 122: "Every person whose bill or charges is or are to be taxed shall, on application either of the official receiver or the trustee, furnish a copy of his bill or charges so to be taxed on payment at the rate of 4*d.* per folio, which payment may be charged to the estate. The official receiver shall call the attention of the trustee to any items which in his opinion ought to be disallowed or reduced."

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The new trustee is advised that at least another 150*l.* would have been taxed off if any one had attended the taxation on behalf of the estate. No impropriety is imputed to Mr. Partridge, but it is submitted that the proceedings were irregular, and unless the Court directs a retaxation there is no means of reopening the matter.

Hansell, for Mr. Partridge. This was a taxation against the estate when it is not usual for any one else to appear on the other side. The position of a trustee in bankruptcy and his solicitor is not the same as that of an ordinary solicitor and client. The taxation is not between solicitor and client, but between the solicitor and the estate. The official receiver is not entitled to be heard on the taxation, nor even to attend: *In re Nash & Sons* (1); and since that decision it has not been the practice to give notice to the official receiver. There is no provision for retaxing a bill after an allocatur has been signed, except r. 124, which expressly empowers the Board of Trade to review a taxation by a registrar of a county court. The general power to review a taxation in bankruptcy is under r. 112 and the general regulations 16 to 19 of the solicitors' scale of costs set forth in the appendix to the rules, Williams on Bankruptcy, 9th ed., p. 642. Those regulations provide that any person may object to the whole or any of the items in a bill of costs, but the objection must be made "before" the allocatur is signed. Therefore this application is too late.

[PHILLIMORE J. Those regulations evidently only apply to any person who has notice of the taxation and not to an outsider.]

By r. 120 notice of the appointment to tax is to be given to "the trustee"; that means the person who is the trustee at the time the bill is lodged. The official receiver is not entitled to appear on the taxation, and a fortiori a person who is not trustee when the bill is lodged is not entitled to appear.

[PHILLIMORE J. I think that prima facie rr. 120 and 122 do not relate to the bills of costs of the solicitor to the trustee, but to the bills of costs of persons claiming adversely to the trustee. I do not think that "every person" includes the

(1) [1896] 1 Q. B. 13.

solicitor of the trustee. I doubt whether these rules refer to taxation between solicitor and client, i.e., to the trustee and his solicitor.]

They point to sub-s. 3 of s. 73 of the Act of 1883 (1), which requires all bills of costs to be taxed, and r. 117 assumes that the bills and charges of any solicitor or other person employed by the trustee will be taxed. The taxation is between the solicitor and the estate, and it is not usual for the trustee to attend.

[PHILLIMORE J. There is no provision which says that the trustee may not appear on the taxation. In the case of *In re Nash & Sons* (2) Vaughan Williams J. evidently thought that the official receiver should call the attention of the trustee to any items which ought to be disallowed. If the trustee cannot attend, what is the use of the official receiver calling his attention to items which he considers improper? I think the trustee has a right to be there.]

It is submitted that the relation between a trustee in bankruptcy and his solicitor is not strictly that of solicitor and client. The taxation is between the estate and the solicitor. It is the estate which pays and which is sufficiently protected by the committee of inspection and by the acuteness of the taxing officer. Here upwards of 200*l.* was taxed off. The trustee could not attend and claim to be heard. But if he could, then Mr. Partridge is the person who at all material times was the trustee for the purposes of this taxation and who alone knew what work had been done. It is too late now to review or to retax, and there is nothing in the Bankruptcy Acts or Rules that gives the Court jurisdiction to reopen the matter.

PHILLIMORE J. I am going to decide this matter on the sequence of the orders and appointments. Now it appears that on March 1, 1910, I allowed for a large amount the proof

(1) The Bankruptcy Act, 1883, s. 73, sub-s. 3, enacts: "All bills and charges of solicitors, managers, accountants, auctioneers, brokers, and other persons, not being trustees, shall be taxed by the prescribed officer, and no payments in respect thereof shall be allowed in the trustee's accounts without proof of such taxation having been made . . . ."

(2) [1896] 1 Q. B. 13, 18.

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of a creditor whose proof had been hitherto rejected, and who would have tried at the first meeting of the creditors to carry the appointment of some other trustee. It is not, therefore, a surprise to anybody that, on his proof being allowed, another meeting of the creditors was then convened for the purpose of removing the then trustee. The notice of the intention to hold that meeting reached the various parties on March 10, and on March 18 a new trustee was accordingly appointed and the old one was removed. On March 15, which was within five days after the notice and three days before the meeting, the solicitor for the outgoing trustee, who was then still trustee, lodged his bills of costs with the proper taxing officer, and obtained an appointment for taxation on April 22. He did not inform the incoming trustee, who was appointed on March 18, of this appointment to tax, nor does he appear to have given notice to the official receiver, and the taxation, in fact, came on without the presence of anybody excepting the solicitor for the outgoing trustee and the taxing officer. I am told a considerable reduction was made on the taxation, and I have no doubt the taxing officer did his duty; but the incoming trustee says "There remains a very heavy bill which will have very serious consequences to the estate being administered in bankruptcy, and I think that if I had been there, to offer observations by myself or by my solicitor, a great deal more would have been taxed off, and I claim that I ought to have the right to be heard in some form or other, whatever the form may be." Now the rules about costs, if one may criticize them at this hour of the day, because they have stood the test of much user, do not seem to me to be quite logically thought out, at any rate in the matter of arrangement and sequence. Mixed up with rules which prima facie relate to claims of persons adverse to the trustee in bankruptcy are rules some of which apparently relate only to claims by solicitors employed by the trustee in bankruptcy, and some of which may have been intended to apply to both classes of cases, or may not. No doubt the position of the solicitor to a trustee in bankruptcy is not quite the same as that of an ordinary solicitor to his client. The Court holds that the trustee cannot make costs by passing over

items which ought to be taxed, or by passing over items which are excessive or improper, in the bill of the solicitor whom he has employed. But not only is it the solicitor but also the various other professional persons mentioned in sub-s. 3 of s. 73 of the Act who must have their bills taxed. The trustee cannot pass the bills without having them taxed, and if he passes them without their being taxed he may possibly be liable to be surcharged. That may possibly be a reason why these rules are not quite arranged as I should have arranged them, and that it is not very clear whether certain rules are intended to apply to the taxation of an adverse litigant, or to the taxation of the official costs, or to both. The result is, taking the judgment of Vaughan Williams J., as he was then, in the case of *In re Nash & Sons* (1) as stating the judicial view of this matter, that some of these rules have rather been pressed into a service for which they were not intended. They have been held to cover the taxation of the official costs quite as much as the taxation of an adverse litigant's costs. That is the construction that Vaughan Williams J. put upon them, and it is not an inconvenient construction, and it is a construction which is likely to lead to justice and economy in the administration of bankruptcy matters, and, therefore, I am not at all sorry to put that construction upon them, and apparently it is a construction that has been adopted. That construction says that rr. 120 and 122 apply to the official costs of the trustee's solicitor, broker, or what not, as well as to the costs of an adverse litigant against the bankrupt's estate. Rule 120 says that every person whose bill or charges is or are to be taxed shall in all cases give not less than seven days' notice of the appointment to tax the same to the official receiver and to the trustee (if any). Obviously that applies to the trustee and his solicitor. Vaughan Williams J. says that it does, and, therefore, the solicitor of a trustee is bound to give not less than seven days' notice of the appointment to tax to his trustee and to the official receiver; then r. 122 says that on the application of either the official receiver or the trustee he shall furnish them with a copy of the bill on paying the necessary charges, and that the official

(1) [1896] 1 Q. B. 13.

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receiver shall call the attention of the trustee to any items which in his opinion ought to be disallowed or reduced. Now upon those rules Vaughan Williams J. decided in the case of *In re Nash & Sons* (1) that they do not go far enough to make the official receiver a party to the taxation. He is not entitled to be heard as an ordinary litigant is upon a taxation. Nay, he is not entitled to be present unless he gets an order from the Court or a judge. But in the course of that decision Vaughan Williams J. says in terms that rr. 120 and 122 apply to the case of the bill of the solicitor of the trustee, and, in fact, his decision was upon such a bill. Now, if the official receiver has to call the attention of a trustee to any items which ought to be disallowed or reduced, that is not in order that the poor trustee may be told "Your lawyer is claiming a great deal that he has no business to claim, and I tell you so, but I know you can do nothing, and I know your mouth is stopped, and you cannot be heard, and therefore I merely give you the unpleasant knowledge that you employ a very extravagant solicitor, and it is now too late to rectify it." That is not the intention. The intention is that he shall call the attention of the trustee to it in order that the trustee may exercise that power which he is given, namely, of appearing on the taxation and raising objections to his own solicitor's bill, just as, when there is a taxation between solicitor and client in an ordinary litigation, the client is entitled to be heard by himself or by a new solicitor upon his late solicitor's bill. I think the last sentence of r. 122 makes it clear that the trustee has a right to be heard.

Apart from that rule, there being nothing to prevent him from being heard, I do not see why the analogy of the ordinary rule between solicitor and client should not apply to the case. But r. 122 makes it clear. Therefore, upon the taxation of the trustee's solicitor's bill, the trustee, if he is so minded, can attend. But having got so far as that, who was the person here to attend on the taxation on April 22? It is true that at the time the bill was lodged the old trustee was the trustee. Whether the solicitor gave seven days' notice to him or not I cannot tell. He could not give the seven days' notice till the appointment was fixed, and the

(1) [1896] 1 Q. B. 13.

appointment when fixed was for April 22. That he did give the notice to the old trustee was denied, or, at any rate, it is said to be doubtful. I will not decide that the old trustee could not be heard. It is very questionable whether he had ceased to be trustee for all purposes by April 22. He might or he might not. But clearly the person to be heard then was *the trustee*, and he, in my view, was entitled to not less than seven days' notice of the appointment to tax, and, therefore, the new trustee, who was unquestionably in office much more than seven days before April 22, was the person entitled to have seven days' notice of that appointment, and to attend in order that he might call attention to any item that ought to be disallowed or reduced, and possibly to be the mouthpiece of the official receiver. It does not follow that, because the new trustee may want the help of the old trustee, the new trustee cannot appear. He can call witnesses on the matter as well as on any other, and if the new trustee wants help he can bring the old trustee in. The taxation of April 22 was a taxation upon which the then trustee was entitled to be heard, and, therefore, a taxation of which he was entitled to have had notice. I add, further, that apparently the official receiver should have had notice and that he had not. Whether that is fatal is another matter. I will not say one way or the other. But from my point of view the man who at that time was trustee was the person entitled to be heard, and I am very glad to be able to reach that conclusion, because I have no doubt that the justice of the case is met in that way; and, without deciding at all what may be the real facts in this case, I will say that the door would be open to very great extravagance and expense if what I have been able to decide I could not have decided.

The result is, therefore, that I order the taxation to be held over again—that is the proper form, I think—with liberty to the new trustee to attend.

Tindale Davis. I submit the form should be that the allocatur should be set aside.

PHILLIMORE J. Setting aside the allocatur may waste money in costs, and there may be other objections. I suspend the

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allocatur till the new trustee has had an opportunity of seeing how matters stand. I direct a new appointment before the taxing Master, and I reserve all questions of costs till I hear what happens before him.

Solicitors: *W. Easton & Sons; Bullock & Co.*

H. L. F.

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June 1.

[IN THE COURT OF APPEAL.]

COMPANIA SANSINENA DE CARNES CONGELADAS *v.* HOULDER BROTHERS & CO., LIMITED AND OTHERS.

Practice—Parties to Action—Joinder of Defendants—Relief claimed against several Defendants in the Alternative—Joinder of different Causes of Action—Order XVI., rr. 4, 7.

The power to join several defendants in the same action for the purpose of claiming relief against them severally or in the alternative under Order XVI., r. 4, is not confined to cases in which the causes of action alleged as against the several defendants are exactly identical, but extends to cases where the subject matter of complaint as against the several defendants is substantially the same, although the causes of action as against them respectively are, technically, different in form, and the several liabilities alleged against them respectively are to some extent based on different grounds.

By a contract between H. Brothers & Co., who were the owners of a line of steamers, and the plaintiffs, who were exporters of frozen meat, carrying on business at Buenos Ayres, H. Brothers & Co. agreed to carry from the Argentine to Europe frozen meat to be shipped from time to time by the plaintiffs on certain named steamers belonging to H. Brothers & Co. or on other suitable steamers in addition to or substitution for the named steamers. It was subsequently agreed that frozen meat should be shipped by the plaintiffs on an additional steamer, procured by H. Brothers & Co., which was called the *Devon* and belonged to another company, for carriage from Bahia Blanca to England on the terms of the first-mentioned contract. This meat was accordingly shipped, and the master of the *Devon* signed bills of lading in respect of it. In an action brought by the plaintiffs in respect of damage to this meat alleged to have been caused by the unseaworthiness of the *Devon*, the plaintiffs joined as defendants H. Brothers & Co. and the owners of the *Devon*, claiming against the

former on the terms of the before-mentioned contract and against the latter upon the bill of lading :—

Held, that the defendants were rightly joined.

Smurthwaite v. *Hannay*, [1894] A. C. 494, and *Sadler* v. *Great Western Ry. Co.*, [1896] A. C. 450, discussed.

Frankenburg v. *Great Horseless Carriage Co.*, [1900] 1 Q. B. 504, and *Bullock* v. *London General Omnibus Co.*, [1907] 1 K. B. 264, followed.

APPEAL from an order made by Hamilton J., as judge of the Commercial Court, as after mentioned.

The action was brought by the plaintiffs against Houlder Brothers & Co., Limited, and the Federal Steam Navigation Company, Limited. The points of claim delivered were as follows :—

"1. The plaintiffs are a company established in Buenos Ayres, and carry on business both there and in London as exporters of frozen meat to England. The defendants Houlder Brothers & Co., Limited, are owners of a line of steamers trading to the Argentine, and the defendants the Federal Steam Navigation Company are the owners of the steamship *Devon*.

"2. By a contract in writing dated December 23, 1903, and made between the plaintiffs and the defendants Houlder Brothers & Co., the said defendants agreed to carry from Buenos Ayres and/or Bahia Blanca to Europe frozen meat to be shipped by the plaintiffs on certain steamships named in the said contract, or on other suitable steamers in addition to or substitution for the said named steamers, upon the terms set out in the said contract: and it was a term of the said contract that all clauses and conditions therein contained should apply to each steamer performing the service in question, each steamer being considered under the contract as a separate interest each voyage.

"3. On December 21, 1908, it was verbally agreed between the plaintiffs and the defendants Houlder Brothers & Co., Limited, and this verbal agreement was subsequently confirmed in writing by a letter of the same date from the said defendants to the plaintiffs, that the said defendants should provide the *Devon* (then belonging to the defendants the Federal Steam Navigation

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Company,) in addition to the steamships named in the said contract to do service thereunder, and that the plaintiffs should ship by her 450 tons of meat at Bahia Blanca to be carried to Avonmouth and/or Liverpool.

"4. The plaintiffs duly shipped at Bahia Blanca in good order and condition about 450 tons of frozen meat on the *Devon*, to be delivered in like good order and condition, under bills of lading in the form used by the Houlder Line dated February 3, 1909, but the said frozen meat arrived at Avonmouth and Liverpool worthless or in a damaged condition, whereby the plaintiffs have suffered damage.

"5. By article 2 of the said contract it was provided that the said steamer should be tight, staunch, and strong, and in every way equipped for the voyage, and in the respects set out in paragraph 7 the *Devon* was not properly equipped for the carriage of the said meat on the said voyage.

"6. Further it was an implied condition of the said contract of carriage between the plaintiffs and the defendants Houlder Brothers & Co., Limited, and it was an implied condition of the contract of carriage expressed in the bills of lading referred to in paragraphs 4 and 8 hereof, that the said steamer should be seaworthy.

"7. The *Devon* at the commencement of the said voyage was not seaworthy for the carriage of meat in that her main boilers and their respective furnaces were defective and worn out, and the boiler tubes, and furnaces, and combustion chambers were scaled, or were in such a condition that they became blocked with salt, so that the said boilers were not in a fit condition to maintain a sufficient supply of steam to the refrigerating plant, in order that a proper temperature might be maintained in the freezing chambers.

"8. Alternatively, the plaintiffs claim against the defendants the Federal Steam Navigation Company, as owners of the *Devon*, and say that the said goods were received on board the vessel of the said defendants in good order and condition, and the bills of lading referred to in paragraph 4 hereof were signed on behalf of these defendants, as owners of the *Devon*, by their agents duly authorized in that behalf.

"Particulars.

"Full particulars of the damage claimed have been delivered to the defendants on or about August 4, 1909.

"The plaintiffs claim against the defendants Houlder Brothers & Co., Limited, and alternatively against the defendants the Federal Steam Navigation Company, Limited, damages 1397*l.* 11*s.* 7*d.*"

By article 13 of the agreement of December 23, 1903, it was provided that, subject to a power of earlier determination thereinafter provided for, this agreement should continue for the term of two years, to be computed from the date of the sailing of the first steamer under this contract, and thereafter from year to year until one party should give to the other twelve calendar months' notice by registered letter post to determine this agreement. By article 14 it was agreed that, "All meat shipped by the shippers in pursuance of this agreement shall be received and carried subject to the terms and conditions of these presents. Bills of lading according to the forms attached hereto shall be signed as and when presented, but, so far as the conditions thereof differ from, or add to, or subtract from the terms hereof, they shall be void and of no effect." The form of bill of lading attached was the form generally in use by Houlder Brothers & Co., Limited, in respect of goods shipped by their line. The terms of the excepted perils clause contained in the agreement of December 23, 1903, differed to some extent in various respects from those of the excepted perils clause contained in the Houlder Line form of bill of lading.

The letter of December 21, 1908, referred to in paragraph 3 of the points of claim, so far as material, was as follows: "S.S. *Devon.* We beg to confirm our conversation with you on the telephone this morning, when it was agreed that you will load in the above named steamer 450 tons of frozen meat at Guatreros (Bahia Blanca) for Avonmouth and/or Liverpool on the following terms:—Rate of freight 13/32nds of a penny per lb. . . . . The Houlder bill of lading to be used, and all other conditions to be in accordance with our contract with you for the conveyance of meat to Liverpool. . . . . For Houlder Brothers & Co., Limited. Thos. L. Rose, Managing Director."

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The bills of lading signed in respect of the meat in question contained the following clause: "freight and all other conditions as per letter dated December 21, 1908, between Messrs. Houlder Brothers & Co. of the one part and Compania Sansinena de Carnes Congeladas of London, therein designated as the shippers, of the other part, and the owners' and shippers' rights and liabilities to be those only which are thereby defined." The bills of lading were signed "For the master p.p. Houlder Brothers & Co., Limited. F. Scott."

An application having been made for an order to strike out the names of the defendants the Federal Steam Navigation Company, as having been improperly joined in the action as defendants, Hamilton J. ordered that their names should be struck out.

Bailhache, K.C. (*Stuart Bevan* with him), for the plaintiffs. The plaintiffs allege that there was a contract by one or the other of the defendant companies, that the ship should be seaworthy for the purpose of carrying the cargo. They rely as against Houlder Brothers & Co., Limited, upon the agreement of December 23, 1903, as incorporated by the letter of December 21, 1908, and the bills of lading, and as against the Federal Steam Navigation Company upon the bills of lading; and further they say that, as regards the contract for the carriage of the meat in question, one of the companies contracted as principal and the other as agent; and, it being doubtful which was which, the case is exactly one of the kind contemplated by Order xvi., rr. 4 and 7. The plaintiffs are in doubt whether the effect of the facts is that Houlder Brothers & Co., Limited, acted as their agents in contracting with the Federal Steam Navigation Company, or that Houlder Brothers & Co. acted as agents of the Federal Steam Navigation Company in making a contract with them, or that the latter company acted as the agents of Houlder Brothers & Co., Limited, in carrying out their contract with the plaintiffs. Order xvi., rr. 4 and 7, must now be construed with reference to the alteration made in Order xvi., r. 1, since the decision in *Smurthwaite* v. *Hannay*. (1) If there is a question

(1) [1894] A. C. 494.

of law or fact common to the cases set up against the defendants who are joined respectively, and a sufficient nexus between the defendants, both which conditions are, it is submitted, fulfilled in the present case, rr. 4 and 7 of Order XVI. apply, and the defendants may be joined. In *Child* v. *Stenning* (1) Mellish L.J. lays down the rule thus: "If we were to say that two persons could not be joined as defendants unless the causes of action against them were exactly the same, the object of the Legislature would be entirely defeated. In most cases where alternative remedies are sought against two persons the causes of action are different; as in the case where an action is brought against an agent and his principal, because the plaintiff is uncertain whether he shall be able to prove the authority given to the agent, as in *Honduras Inter-oceanic Ry. Co.* v. *Tucker*. (2) There the plaintiff seeks compensation for one wrongful act, but he cannot tell which of two parties is really liable. I think it was exactly the case intended to be provided for by the rule." Where an agent has made a contract, professing to act for a principal, clearly the party with whom he contracted could, if the contract were broken, join the alleged principal and the agent as defendants in an action, but the causes of action against them would not technically be the same, one being for breach of the contract, and the other for breach of an implied warranty of authority. *Bullock* v. *London General Omnibus Co*, (3) is a clear authority for the plaintiffs in this case.

J. R. Atkin, K.C. (*L. Noad* with him), for the defendants the Federal Steam Navigation Company, Limited. In this case the causes of action set up against the two defendant companies respectively are different and distinct. It was held by the House of Lords in *Smurthwaite* v. *Hannay* (4) that Order XVI. related only to joinder of parties, and not to joinder of causes of action. The decision in *Child* v. *Stenning* (5) was prior to *Smurthwaite* v. *Hannay*. (4) It is true that the question in the last-mentioned case referred to Order XVI., r. 1, as it then stood, and to joinder of plaintiffs in respect of distinct causes of action,

(1) (1877) 5 Ch. D. 695, at p. 702.
(2) (1877) 2 Ex. D. 301.
(3) [1907] 1 K. B. 264.
(4) [1894] A. C. 494.
(5) 5 Ch. D. 695.

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but Lord Herschell L.C., in giving judgment, said (1): "It cannot be doubted that whatever construction is put upon the rule I have been considering, must be applied equally to rule 4 of the same Order. The result of the respondents' contention would be that any number of plaintiffs might join together to sue any number of defendants in respect of causes of action not common to either plaintiffs or defendants." He then proceeded to hold that Order XVI. did not sanction such a joinder of parties. In *Sadler* v. *Great Western Ry. Co.* (2) the House of Lords, following their decision in *Smurthwaite* v. *Hannay* (3), held that claims for damages against two or more defendants in respect of their several liability for separate torts could not be combined in one action. It is true that, since the decision in *Smurthwaite* v. *Hannay* (3), the terms of Order XVI., r. 1, have been altered, and under that rule, as it now stands, plaintiffs may in certain cases be joined in respect of distinct causes of action, but there has been no alteration of the terms of r. 4 of Order XVI.; and it is submitted that, this being so, the decision of the House of Lords in *Sadler* v. *Great Western Ry. Co.* (2) still holds good. It is impossible to treat the construction of r. 4 of the Order as altered by reason of the alteration of the terms of r. 1. The question in this case must be determined with reference to the terms of the points of claim. There is no suggestion in them of any question as to who were principals and who were agents as between the two defendant companies in respect of the contract under which the meat was carried on the *Devon*. The first seven paragraphs of the points of claim set forth a claim against Houlder Brothers & Co. for breach of the terms of the contract of December 23, 1903, as incorporated by the letter of December 21, 1908. The eighth paragraph claims against the Federal Steam Navigation Company upon the bill of lading contract. These are distinct and different causes of action. The terms of the exception clause in the contract of 1903 are different from those of the exception clause in the bill of lading. The claim made against the Federal Steam Navigation Company arises from the shipment upon their ship of the

(1) [1894] A. C. 501. (2) [1896] A. C. 450.
(3) [1894] A. C. 494.

plaintiffs' meat, and is distinct from that made against Houlder Brothers & Co., which is based upon their contract with the plaintiffs. The bill of lading is quite unessential to the claim upon that contract, and, as between the plaintiffs and Houlder Brothers & Co., is a mere receipt for the goods, as in a case where bills of lading are given under a charterparty. On the pleadings as they stand, the claim against Houlder Brothers & Co. does not turn on the bill of lading at all, and the plaintiffs' points of claim shew no contract with the Federal Steam Navigation Company as principals on the terms of the contract of 1903. The decision in *Bennetts & Co.* v. *McIlwraith* (1), which appears unfavourable to the respondents' contention, seems to have turned upon a misconception of the effect of *Smurthwaite* v. *Hannay* (2), namely that the House of Lords did not in that case consider r. 7 of Order XVI., whereas they clearly considered Order XVI. as a whole. In *Frankenburg* v. *Great Horseless Carriage Co.* (3), rightly or wrongly, the Court came to the conclusion that the cause of action alleged against the several defendants was substantially the same. *Bullock* v. *London General Omnibus Co.* (4) was not really a decision on this point, but as to costs after the trial, no objection having been taken to the joinder of the defendants before trial. *Thompson* v. *London County Council* (5) is an authority against the plaintiffs' contention, and is binding on this Court. [He also cited *Gower* v. *Couldridge*. (6)]

Bailhache, K.C., for the plaintiffs, was not called upon to reply.

VAUGHAN WILLIAMS L.J. I cannot say, speaking for myself, that I feel altogether satisfied as to this case, but I think I must base my judgment on grounds similar to those upon which Romer L.J. decided the case of *Frankenburg* v. *Great Horseless Carriage Co.* (3) He arrived in that case at the conclusion that the real cause of action as against all the defendants was the issue of the misleading prospectus, and, that being so, it was possible to join all the defendants in the action without any

(1) [1896] 2 Q. B. 464.
(2) [1894] A. C. 494.
(3) [1900] 1 Q. B. 504.
(4) [1907] 1 K. B. 264.
(5) [1899] 1 Q. B. 840.
(6) [1898] 1 Q. B. 348.

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violation of any of the rules of Order xvi. I have arrived at a similar conclusion, in the present case, upon the construction which, on the whole, I am prepared to put on the points of claim. The claim of the plaintiffs, as it appears on the face of their points of claim, is so little precise that it is very difficult to say exactly what it means. It appears to me that the points of claim might possibly be read as alleging, as against the defendant companies respectively, two distinct causes of action, the only common element of which would be that they both result in a claim for damages in respect of injury to cargo caused by the unseaworthiness of the ship. According to my view, in a case where there is no pretence for saying that the respective causes of action, in respect of which several defendants are joined, are other than separate and distinct causes of action, the fact that those causes of action arise out of the same transaction is not a sufficient ground for allowing the defendants to be joined in the same action. But, on the other hand, though this is a possible view, and one which might not unnaturally be taken at first sight, of the effect of these vague and unprecise points of claim, I come, on the whole, to the conclusion that it is possible to read them as has been suggested for the plaintiffs, namely as alleging that the Federal Steam Navigation Company were principals, and Houlder Brothers & Co., Limited, acted as their agents in this matter. I understand that, according to the practice which prevails in the Commercial Court, and, I am afraid, to some extent in the Courts generally under the Judicature Acts, no greater precision in pleading is required than appears in these points of claim. I regret it, and am not by any means the only judge who has commented on the lamentable want of precision which is prevalent under the system of pleading now in force. Having regard, however, to the possibility of putting the construction which I have mentioned upon the points of claim, the conclusion at which I arrive is that the order of Hamilton J. striking out the Federal Steam Navigation Company as defendants must be set aside.

FLETCHER MOULTON L.J. In this case the plaintiffs sue Houlder Brothers & Co., and the Federal Steam Navigation

Company, in respect of damage to frozen meat carried from Bahia Blanca to this country, under the following circumstances. The relation between the plaintiffs and the defendants Houlder Brothers & Co. is formulated by a standing agreement dated December 23, 1903, under which those defendants from time to time supplied certain specified steamers to carry frozen meat shipped by the plaintiffs from the Argentine to Europe. On December 21, 1908, it was agreed orally between the plaintiffs and these defendants, and that agreement was afterwards confirmed by letter, that the latter should provide an additional steamer called the *Devon*, which belonged to the other defendants, the Federal Steam Navigation Company, to carry frozen meat for the plaintiffs on the terms of the agreement of December 23, 1903. By paragraph 4 of the points of claim, it is stated that the plaintiffs duly shipped at Bahia Blanca, in good order and condition, on the *Devon* about 450 tons of frozen meat, to be delivered in like good order and condition, under bills of lading in the form used by the Houlder Line dated February 3, 1909, but the said frozen meat arrived at Avonmouth and Liverpool worthless, or in a damaged condition, whereby the plaintiffs have suffered damage. The plaintiffs bring their action in respect of that damage. They claim in the first place against the defendants Houlder Brothers & Co., as being liable in respect thereof; and, alternatively, if those defendants are not liable, they claim that the defendants the Federal Steam Navigation Company are liable—that is to say, they allege that for the breach of the contract evidenced by the bills of lading one or the other of the two defendant companies is responsible. Under these circumstances the plaintiffs have joined those two companies as defendants. An application was made to the judge of the Commercial Court to strike out the second defendant company. He acceded to that application, and the question is whether he was right in so doing.

This question appears to be governed mainly by Order xvi., r. 4, which provides that "all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative: and judgment may be given against such one or more of the defendants as

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may be found to be liable, according to their respective liabilities, without any amendment."

Speaking for myself, if the matter were res integra, I should have thought that r. 4 of Order xvi. was expressly framed to cover such a case as the present. The main issue here is whether the goods shipped under the bill of lading contract were damaged under such circumstances as to constitute a breach of the obligation of the parties (whoever they may be) who were bound by that contract; and I should have supposed that a case in which there was a question as to which of two parties was liable under that contract for the damage would be exactly the kind of case in which a right to relief against them in the alternative might be alleged under the rule. I should, therefore, have had no hesitation here in taking the view that both the defendant companies should be allowed to remain defendants to the action, and should have considered this to be the proper and most convenient course to pursue.

But it is urged that we are not at liberty to take that view on account of previous decisions in the House of Lords, and to some extent in this Court as well. There are no doubt two decisions in the House of Lords, which were given at a time when the rules of Order xvi. were not in their present form. Rule 1 was then in a form corresponding to that of r. 4, and the latter rule was as it now stands. In the case of *Smurthwaite* v. *Hannay* (1), where there was a joinder of plaintiffs, which, if I may be permitted to say so, was distinctly improper, the House of Lords gave a decision as to the meaning of r. 1 as it then stood, and held that Order xvi. generally, and in particular r. 1 of that Order, did not relate to joinder of different causes of action, but only to joinder of parties in respect of the same cause of action. That decision would, of course, be binding upon us, if the terms of Order xvi. stood unaltered. In the similar case of *Sadler* v. *Great Western Ry. Co.* (2), which related to a joinder of defendants at a time when the rules of Order xvi. were in the same condition, the House of Lords gave a similar decision as to the construction of r. 4 to that which they had given as regards r. 1 in

(1) [1894] A. C. 494. (2) [1896] A. C. 450.

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Smurthwaite v. *Hannay*. (1) Then the Rule Committee altered r. 1 and made it clear that, as altered, it is intended to apply, not only to the joinder of several plaintiffs in respect of the same cause of action, but also to the joinder of several plaintiffs in respect of different causes of action. The rule now stands thus: "All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction, or series of transactions, is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate actions any common question of law or fact would arise; provided that, if upon the application of any defendant it shall appear that such joinder may embarrass or delay the trial of the action, the Court or a judge may order separate trials, or make such other order as may be expedient, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment." The terms of this rule to my mind make it clear that Order xvi. does not now deal solely with joinder of parties, but also deals with joinder of causes of action. Considering that rule with reference to the interpretation of r. 4, it appears to me that, just as the House of Lords, before the alteration of that rule, construed the wide and general language of r. 1 by reference to the general scope of the Order in which they could, as the rules then stood, find no intention to deal with joinder of causes of action, so now we are entitled to consider the meaning of the wide language of r. 4 as forming part of an Order which purports to some extent to deal with joinder of causes of action. Turning to r. 1 in its new form, I find that the words inserted are of the nature of words of restriction or qualification, which, while they shew that it is intended by the rule to deal with joinder of causes of action, at the same time put some limitation on the joinder of causes of action which may be made under it. Looking at r. 4 by the light of that rule, it appears that the Rule Committee deemed it to be unnecessary to insert similar words in r. 4, and that they thought it desirable to keep the terms of that rule of their original width, after having made it clear that the Order was not limited to joinder of parties, but was intended

(1) [1894] A. C. 494.

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to deal also with joinder of causes of action. The result appears to me to be that we are not now bound to limit the plain meaning of the words of r. 4 by reference to a decision of the House of Lords given under a different state of circumstances, when Order XVI. stood as it was originally framed.

A number of decisions of the Court of Appeal have also been cited to us. I confess that I find it difficult to reconcile all those decisions, and so I am driven back upon the plain meaning of the words of r. 4, which, as I have said, appear to me clearly to contemplate such a case as the present.

The decision in the case of *Frankenburg* v. *Great Horseless Carriage Co.* (1) seems to me to be an authority in favour of the view which I am taking. In that case a company and individual directors of the company were joined as defendants in one action, in which rescission of a contract to take shares and a return of money paid on allotment were claimed as against the company, and damages were claimed as against the individual directors, on the ground that false statements had been made in a prospectus of the company. It is clear to my mind that these were different causes of action, and yet the Court decided that under r. 4 these defendants might be joined. It follows, therefore, from that decision that the strict interpretation which the respondents' counsel asked us to put upon the terms of the rules of Order XVI., other than r. 1, namely that they do not in any case admit of defendants being joined in respect of different causes of action, has not been acted upon by this Court. For these reasons I think that the joinder of these defendants was right and that the order of the learned judge was wrong and should be reversed.

BUCKLEY L.J. In the Rules of the Supreme Court, each Order has a heading. The heading of Order XVI. is "Parties." The heading of Order XVIII. is "Joinder of Causes of Action." In *Smurthwaite* v. *Hannay* (2) the House of Lords held that r. 1 of Order XVI., as it then stood, being the rule as to joinder of plaintiffs, with which they had in that case to deal, related only to joinder of parties, and had no reference to joinder of causes of action. Lord

(1) [1900] 1 Q. B. 504. (2) [1894] A. C. 494.

Herschell L.C. in delivering his opinion in that case said (1): "It cannot be doubted that whatever construction is put upon the rule I have been considering, must be applied equally to rule 4 of the same order." Rule 4, which is the rule as to joinder of defendants, is the rule with which we have to deal in the present case. As a consequence of the decision in *Smurthwaite* v. *Hannay* (2), r. 1 of Order XVI. was altered, and, as altered, that rule does now deal with joinder of causes of action as well as with joinder of parties. Under these circumstances the first material question is, what is now the effect of r. 4? It was urged by the respondents that the Rule Committee have not altered the terms of that rule. The effect, however, of the alteration of r. 1 upon Order XVI. is that that Order is not now confined to joinder of parties, but, at any rate as regards r. 1, it extends to joinder of causes of action; and we now have to read r. 4 as forming part of the code of rules contained in the Order as it at present stands. Rule 4 runs thus: "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative: and judgment may be given against such one or more of the defendants as may be found to be liable, according to their several liabilities, without any amendment." The question is whether, under that rule, it is not now in some cases possible to join, as defendants in the same action, persons as against whom the causes of action alleged do not depend upon exactly the same set of circumstances. In *Child* v. *Stenning* (3) the Court of Appeal arrived at the conclusion that, under the rules as they then stood, causes of action of the following description might be joined as against two defendants. The plaintiff brought an action of trespass to his land. He joined as defendants in the action the person alleged to have trespassed, and his own lessor, alleging that the first defendant was liable for trespass, because he had no right to be on the plaintiff's land, and, as to the second defendant, that, if the first defendant had any right to be on the plaintiff's land, it was because the second defendant had granted him a right of way, which was a breach of a covenant for

(1) [1894] A. C. 501. (2) [1894] A. C. 494.
(3) 5 Ch. D. 695.

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quiet enjoyment entered into with the plaintiff by the second defendant. It was held that the two defendants were rightly joined in the action. That decision has not, so far as I know, been overruled. The argument presented to us by the respondents' counsel appears to me to be inconsistent with two recent decisions, namely, *Frankenburg* v. *Great Horseless Carriage Co.* (1) and *Bullock* v. *London General Omnibus Co.* (2) In the former of those cases the "cause of action," using that term as meaning the facts from which there arose in the plaintiff a right to relief against somebody, was the issue of the prospectus. The defendants in the action were the company and its directors. As against the company the relief claimed was rescission of the contract to take shares: as against the directors the relief claimed was damages for fraudulent representations in the prospectus, including the statutory fraud arising from s. 38 of the Companies Act, 1867. In that case, therefore, under a set of circumstances common to the several cases against the several defendants, the defendant company was alleged to be liable on one ground, and the defendant directors were alleged to be liable upon a ground which was different, because it depended upon a statute which did affect them but did not affect the company. There were, therefore, different causes of action in the sense that the material circumstances upon which liability depended in the case of the different defendants respectively were not coterminous. It was, nevertheless, held that the two causes of action against the respective defendants might be joined in the same action. In *Bullock* v. *London General Omnibus Co.* (2), the plaintiff, riding in an omnibus belonging to the London General Omnibus Company, was injured through a collision between that omnibus and a cart belonging to another company. The plaintiff alleged that her injuries were caused by the joint negligence of the two companies, or, alternatively, by the separate negligence of each of them. In such a case the negligence alleged against the two defendant companies respectively could not depend upon precisely the same facts. No objection was taken to the joinder of the defendants before the trial. The actual question was as to costs, but that question was determined with reference to the

(1) [1900] 1 Q. B. 504. (2) [1907] 1 K. B. 264.

question whether the defendant company which was not found liable was rightly joined, and it was held that it was. The case of *Thompson* v. *London County Council* (1) was pressed upon us by the counsel for the respondents. That was a different case from those which I have just mentioned and from the present case. There the plaintiff brought an action against the London County Council for letting his house down by excavations, and he sought for leave to add as defendants in the same action the New River Company, for the purpose of claiming against them on the ground that they had let his house down by leaving their water main near his house unstopped or insufficiently stopped. The cause of action as against one of the two defendants rested on a different state of facts from that alleged in support of the claim as against the other. It was held that under those circumstances the defendants ought not to be joined.

The circumstances of the present case are as follows: the plaintiffs allege that they shipped certain meat belonging to them upon a vessel, to be carried from the Argentine to this country, and that the vessel was not seaworthy, by reason whereof the meat was damaged. They join as defendants in an action in respect of that damage two companies. As regards one of them the plaintiffs allege that that defendant had entered into a certain contract with the plaintiffs for the carriage of the meat, under which that defendant is liable; as against the other the plaintiffs allege that the ship in which the meat was carried was the ship of those defendants, and that they entered into a contract with the plaintiffs by the bill of lading; and the plaintiffs say that one or other of the defendant companies is liable to them in respect of the damage to the meat. It is the same cause of action as against both defendants, if by that is meant that all the material facts which go to shew injury to the plaintiffs' goods, by reason of the unseaworthiness of the ship, are common to the case as against both the defendant companies. The difference as between the two defendant companies lies, as in *Frankenburg* v. *Great Horseless Carriage Co.* (2), in the fact that one of the defendant companies may be liable on one ground, and the other may be liable on another ground, and therefore the respective liabilities

(1) [1899] 1 Q. B. 840. (2) [1900] 1 Q. B. 504.

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of the two companies do not rest upon a common ground. Upon the authorities that does not seem to me to be a reason for saying that the two companies cannot be joined as defendants under the rules in respect of what is one cause of action as regards the investigation of the facts upon which the liability alleged against them respectively depends. It appears to me therefore that the defendants in this case were properly joined and that this appeal should be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Hollams, Sons, Coward & Hawksley.*

Solicitors for defendants the Federal Steam Navigation Company: *W. A. Crump & Son.*

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April 26, 27.

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Limitation of Action—Rent-charge — Personal Covenant to pay — Remedy when barred—Civil Procedure Act, 1833 (3 & 4 *Will.* 4, *c.* 42), *s.* 3—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 1.

The effect of s. 1 of the Real Property Limitation Act, 1874, upon s. 3 of the Civil Procedure Act, 1833, is to cut down the period within which a covenant to pay a rent-charge can be enforced, so that after the expiry of twelve years from the last payment without acknowledgment the remedy on the personal covenant is gone as well as the remedy against the land on which the money was charged.

APPEAL from the county court of Ashton-under-Lyne.

By an indenture dated April 28, 1853, Francis Astley conveyed to Samuel Turner in fee, subject to a yearly rent-charge of 12*l.* 2*s.*, a certain plot of land situate at Dukinfield. By an indenture dated May 18, 1853, Samuel Turner conveyed the said plot to Henry Gartside in fee.

By an indenture dated July 26, 1853, Henry Gartside conveyed a portion of the said plot of land to John Chadwick in fee subject to a yearly rent-charge of 6*l.* 2*s.* 6*d.* which John Chadwick thereby covenanted for himself, his heirs and assigns, that he would duly pay to Henry Gartside, his heirs and assigns.

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By an indenture dated July 30, 1853, Henry Gartside conveyed another portion of the said plot of land to Thomas Millingtree in fee subject to a yearly rent-charge of 5*l.* 5*s.*

By an indenture dated December 27, 1858, Henry Gartside conveyed the remaining portion of the said plot of land to William Shaw in fee together with the two rent-charges of 6*l.* 2*s.* 6*d.* and 5*l.* 5*s.*, and William Shaw covenanted for himself, his heirs, executors, administrators and assigns, to pay the yearly rent-charge of 12*l.* 2*s.* and keep Henry Gartside, his heirs, &c., indemnified against all actions in respect thereof.

William Shaw died on July 16, 1889, and his son Henry Shaw became entitled to the plot of land and the two rent-charges specified in the last-mentioned indenture. On February 12, 1909, Henry Shaw died, and the plaintiffs were executors of his will. In 1886 Elizabeth Crompton became entitled to the plot of land conveyed to John Chadwick in July, 1853. On March 7, 1901, she died, and the defendant, John Crompton, was her administrator. The rent-charge of 6*l.* 2*s.* 6*d.* created by the indenture of July 26, 1853, was never paid since September, 1893, and the arrears of such rent-charge from September 29, 1894, to September 29, 1908, amounted to 91*l.* 17*s.* 6*d.* The action was brought to recover those arrears.

The county court judge held that the claim was barred by s. 8 of the Real Property Limitation Act, 1874, and that the rent-charge was extinguished by s. 34 of 3 & 4 Will. 4, c. 27, and also that the burden of the covenant to pay the rent-charge did not run with the land so as to bind the assignee of the purchaser. He accordingly gave judgment for the defendant. The plaintiffs appealed.

Gordon Hewart, for the plaintiffs. The county court judge was wrong in holding that the rent-charge of 6*l.* 2*s.* 6*d.* was extinguished. It was but an apportioned part of the overriding rent-charge of 12*l.* 2*s.* which had always been duly paid. The whole rent-charge issues out of every part of the land, and before the abolition of real actions in 1833 an action of novel disseisin would have lain against the defendant to recover the whole amount, for a rent-charge cannot be apportioned: per Brett M.R.,

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Christie v. *Barker*.(1) And since the abolition of the superior remedy of a real action an action of debt will lie: *Thomas* v. *Sylvester*(2); *Searle* v. *Cook*. (3); and that action of debt will, like the real action, lie for the whole amount against the owner of a portion only of the land—*Christie* v. *Barker* (1)—for the effect of the statute of 1833 was only to alter the remedy and not the extent of the obligation: *Pertwee* v. *Townsend*. (4) If then the rent-charge of 12*l*. 2*s*. had not been paid the owner of it could have sued the defendant in debt or have put in a distress upon his land for the whole rent-charge, and, apart from the covenant of indemnity by Gartside, the defendant's only remedy would have been against the owners of the other portions of the land for a contribution. And the defendant cannot rely upon the covenant of indemnity, for that covenant was in consideration of the defendant paying the 6*l*. 2*s*. 6*d*., which was his proportion of the head rent-charge. The liability of Gartside, and of the plaintiffs as his assigns, upon the covenant of indemnity was conditional on that payment, and as the defendant has failed to keep up his payments of the contribution, the case must be treated as though the covenant was not there. Moreover, there is a further reason for holding that the rent-charge is not extinguished. The plaintiffs' predecessor in title paid the whole rent-charge, and each time that he paid it there arose by the common law, and wholly apart from any contract to contribute, a liability on the part of the defendant to pay his contribution towards that payment, constituting a new cause of action of debt.

The rent-charge then being still alive, the question is how much the plaintiffs can recover. Upon the defendant's common law liability to contribute the plaintiffs can recover six years' arrears. But there was here a covenant by the defendant's predecessor to pay the 6*l*. 2*s*. 6*d*., and upon that covenant the plaintiffs are entitled to recover the whole of the arrears. It is true that by s. 42 of the Real Property Limitation Act, 1833, no "arrears of rent" shall be recovered by any distress action or suit but within six years next after the rent shall have become

(1) (1884) 53 L. J. (Q.B.) 537, at p. 541.
(2) (1873) L. R. 8 Q. B. 368.
(3) (1890) 43 Ch. D. 519.
(4) [1896] 2 Q. B. 129.

due or next after an acknowledgment of it shall have been given in writing. But that section only applies to proceedings against the land; it has no application to personal actions on bonds or covenants for the payment of rent: *Hunter* v. *Nockolds* (1); *Manning* v. *Phelps*. (2) Such actions are governed by s. 3 of the Civil Procedure Act, 1833, and may be brought at any time within twenty years after the accrual of the cause of action: *Paget* v. *Foley* (3); *Strachan* v. *Thomas*. (4) This limitation of twenty years in actions of covenant for rent has not been affected by the Real Property Limitation Act, 1874. Sect. 8 of that Act provides that no action shall be brought to recover "any sum of money secured by any mortgage judgment or lien or otherwise charged upon or payable out of any land or rent . . . . but within twelve years next after a present right to receive the same shall have accrued." But that section is substituted for s. 40 of the Real Property Limitation Act, 1833, and has no application to a case like the present: *Hunter* v. *Nockolds* (1); *Darley* v. *Tennant*. (5) Those sections have reference to capital sums charged upon land. A rent-charge issuing out of land cannot be said to be a "sum of money" charged upon or payable out of land. In the last-mentioned case North J. drew attention to the distinction between capital sums charged on land on the one hand and arrears of rent on the other. The former are within s. 8 of the Act of 1874, the latter are not.

The county court judge here thought the case was covered by *Sutton* v. *Sutton*. (6) But that case is distinguishable. The action there was upon a covenant in a mortgage deed; it was a covenant to pay a capital sum, and fell within the language of s. 8. The Court accordingly held there that the twelve years limitation imposed by that section applied to the personal remedy on the covenant as well as to the remedy against the land. And *Fearnside* v. *Flint* (7), where the decision was the same, was also a case of a covenant to pay a mortgage debt. The case of *In re Nugent's Trusts* (8) is not against the

(1) (1849) 1 Mac. & G. 640.
(2) (1854) 10 Ex. 59.
(3) (1836) 2 Bing. N. C. 679.
(4) (1840) 12 Ad. & E. 536.
(5) (1885) 53 L. T. 257.
(6) (1882) 22 Ch. D. 511.
(7) (1883) 22 Ch. D. 579.
(8) (1885) 19 L. R. Ir. 140.

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appellants. That was a claim by the executors of a grantee of an annuity upon a fund standing in Court to the credit of the trusts of a settlement; it was not an action upon a covenant to pay the annuity. Porter M.R. expressly said that in his opinion "an annuity is not aptly described as a 'sum of money' charged, &c."

[BRAY J. Why does not s. 1 of the Act of 1874 apply to this case? It deals specifically with "rent."]

Because that section, like s. 2 of the Act of 1833, deals only with the remedy against the land; it has nothing to do with the personal remedy on the covenant. The object of the Real Property Limitation Acts was only to release the land from incumbrances, not to relieve the debtor from his personal liability.

Assuming that the action on the covenant is not barred by lapse of time, the fact that both the plaintiffs and the defendant are assigns is no objection to the action. The benefit of the covenant passes to the assignee of the rent: *Brewster* v. *Kidgill.* (1) And the burden of the covenant runs also with the land: Smith's Leading Cases, 11th ed., vol. 1, pp. 78 et seq. In *Austerberry* v. *Oldham Corporation* (2) Lindley L.J. seems to have thought that a covenant to pay a rent-charge was just the sort of covenant that would bind the assignees of the land.

Acton, for the defendant. The rent-charge of 6*l.* 2*s.* 6*d.* has ceased to exist. By s. 34 of the Real Property Limitation Act, 1833, on the determination of the period limited for bringing an action for the recovery of rent the right is extinguished. A rent-charge is a "rent" within that statute: *Jones* v. *Withers.* (3) It is equally a rent within s. 1 of the Act of 1874, and therefore after the lapse of twelve years without payment or acknowledgment it is extinguished. And if the rent-charge is itself extinguished, it would be absurd, as Jessel M.R. said in *Sutton* v. *Sutton* (4), that the remedy on the personal covenant to pay it should survive. The passage in Jessel M.R.'s judgment in which he laid stress on that absurdity is cited with approval by Porter M.R. in

(1) (1698) 12 Mod. 166.
(2) (1885) 29 Ch. D. 750, at p. 781.
(3) (1896) 74 L. T. 572.
(4) 22 Ch. D. 511.

In re Nugent's Trusts. (1) It is contended that s. 1 of the Act of 1874 qualifies s. 3 of the Civil Procedure Act, 1833, in the same manner and for the same reasons as it was held in *Sutton* v. *Sutton* (2) that that section was qualified by s. 8. But further the arrears of rent-charge here are sums of money charged upon land within the meaning of s. 8, and if so the case is directly covered by the authority of *Sutton* v. *Sutton.* (2) [He referred to *Kirkland* v. *Peatfield.* (3)]

Gordon Hewart in reply.

BRAY J. This is an action to recover arrears of rent-charge due under a covenant contained in a deed dated July 26, 1853, the action being by the assignee of the covenantee against the assignee the covenantor. Before the county court judge two defences were raised to that claim. One was that the covenant did not run with the land. The other was that the claim was barred and the rent-charge extinguished by the operation of the Real Property Limitation Act, 1874, coupled with the Real Property Limitation Act, 1833. It seems to me unnecessary to decide the first point whether the covenant ran with the land, because I am in the defendant's favour on the second point that the action is barred. The county court judge decided in the defendant's favour on both grounds, but I propose only to deal with the second.

The county court judge decided that the action on the covenant was barred and the rent-charge extinguished by s. 8 of the Act of 1874, and it has been argued before us that the action is barred as well by s. 1 as by s. 8. I propose to deal only with s. 1. That section says that "No person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims." The first question that arises is whether this rent-charge is a rent within the meaning of that section. The section is in the same terms as s. 2 of the earlier Act of 1833, and in s. 1 of the Act the term "rent" is defined to extend to "all annuities and periodical

(1) 19 L. R. Ir. 140. (2) 22 Ch. D. 511.
(3) [1903] 1 K. B. 756.

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sums of money charged upon or payable out of any land," and the question has arisen in several cases as to whether a rent-charge is a rent within that definition. The meaning of the term "rent" has undoubtedly been narrowed by decisions, amongst others by that in *Grant* v. *Ellis* (1), where the question was whether a rent reserved under a lease between landlord and tenant was within the section. It was held that it was not, but the Court at the same time expressed the opinion that a rent-charge existing as an inheritance was within it. That expression of opinion was unnecessary to the decision, but the point was subsequently expressly decided in the same way by the Court of Appeal in *Jones* v. *Withers*. (2) The reason given by Rolfe B. in *Grant* v. *Ellis* (1), and approved by Lindley L.J. in *Jones* v. *Withers* (2), for holding that rent reserved on a demise is not within the Act is that s. 2 uses the word "recover," which means "obtain possession or seisin of," and rent under a demise is not the subject of seisin. I think I must treat it as clear that the rent-charge here was a rent within the meaning of s. 1 of the Act of 1874.

Then there arises the question as to the effect of that statute upon the personal covenant to pay the rent-charge. I do not think that there has been any decision with reference to s. 1, but there has with reference to s. 8. In *Sutton* v. *Sutton* (3) the action was brought in 1882 to recover money due under a mortgage no interest upon which had been paid since 1869, and the question was whether the remedy under the covenant did not remain, the twenty years limited by s. 3 of the Civil Procedure Act, 1833, not having expired, notwithstanding that by virtue of s. 8 of the Act of 1874 the remedy against the land was gone. The Court held that the effect of s. 8 was to cut down the period of limitation provided by s. 3 of the Civil Procedure Act. Jessel M.R. in the course of his judgment, speaking of the law of limitation, said: "The principle on which the law has always been based is either actual satisfaction or presumed satisfaction, or such delay on the part of the creditor as entitles the debtor to believe that he will not be called upon to pay. It seems absurd

(1) (1841) 9 M. & W. 113. (2) 74 L. T. 572.
(3) 22 Ch. D. 511.

that you should get rid of the greater, so to speak, namely the security upon the land, and should nevertheless retain the lesser, namely the personal liability to pay. The result to my mind would be too absurd." Then he proceeded to deal with the language of s. 8 and pointed out that a mortgage debt came directly within it, and he accordingly held that that section qualified the earlier section. Cotton L.J. said: "One difficulty I have felt has been in consequence of the case of *Hunter* v. *Nockolds* (1), decided by Lord Cottenham, in which he expressed an opinion that although in actions brought to recover money issuing out of the lands only six years' interest could be allowed, yet he based his decision upon this ground, that one must take the two statutes 3 & 4 Will. 4, c. 27 and 3 & 4 Will. 4, c. 42 together. That might be right under the circumstances. He was driven to that by this consideration, that the one Act was only passed three weeks before the other; and therefore he said you must read the two together and take the later one only as an explanation of the other Act. I think we are not in any such difficulty here, because the section we have to construe is contained in an Act passed in the year 1874, and therefore there is no necessity for construing this so as to leave the same bar to an action on the covenant as that which is provided by s. 42 of the earlier Act. There is no necessity to follow in this case the way in which Lord Cottenham dealt with the two Acts passed almost simultaneously." The result of that decision was in terms to say that though the two Acts of 1833 were to be read together there was not the same necessity to read the Act of 1874 and the Civil Procedure Act of 1833 together, and that in effect s. 8 of the Act of 1874 did qualify s. 3 of the earlier Act. Now it seems to me that every reason that was put forward there for that decision applies equally to the argument that s. 1 of the Act of 1874 qualifies s. 3 of the Civil Procedure Act. I am of opinion that s. 1 did so qualify it, and that the period within which the remedy upon a personal covenant to pay a rent-charge can be enforced is no longer twenty years, but twelve. As the twelve years have expired in this case the remedy on the covenant equally with that against the land is barred, and it seems to follow from s. 34

(1) 1 Mac. & G. 640.

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of the Real Property Limitation Act, 1833, that the right is extinguished also.

Another contention raised by Mr. Hewart was this. There is an overriding rent-charge payable to Mr. Astley. That rent-charge having been continuously paid is still in existence, and it would be open now to Mr. Astley, if at any time it were unpaid, to distrain on the defendant's plot for the whole amount, and it was said that the defendant's only remedy would be against the owners of the other plots for contribution. It was contended that the fact that the defendant would be liable to pay the rent in that form shews that the rent-charge sued for is not extinguished. Then the case was further put in another way. It was said that as the owner of the plaintiffs' plot had paid the whole of the overriding rent-charge, every time that he paid it a right of action for a contribution towards the amount so paid accrued to the plaintiffs' predecessor against the defendant. But both those contentions are based upon the assumption that the defendant cannot now rely upon the covenant by Gartside to pay the head rent-charge of 12*l.* 2*s.* and to keep the defendant indemnified against it. It was said that Gartside's liability on the covenant of indemnity was conditional on the payment by the defendant of the 6*l.* 2*s.* 6*d.* But I do not see why it should be so construed. It is not expressed to be so. The two covenants appear to me to be entirely separate and independent. The consideration for the grantee's covenant to pay the 6*l.* 2*s.* 6*d.* is the grant of the land. The grantor's covenant to pay the 12*l.* 2*s.* forms no part of that consideration. Moreover, even if the plaintiffs' contention that they could still sue for a contribution were right, their claim would be not for 6*l.* 2*s.* 6*d.*, but for a proportion of the 12*l.* 2*s.*, and there was no evidence to shew that 6*l.* 2*s.* 6d. represents the proper proportion. The claim before the county court judge was upon the covenant to pay the 6*l.* 2*s.* 6*d.* and nothing else, and they cannot now put forward an entirely different cause of action. On these grounds I think the judge below must be affirmed. He decided the case upon s. 8 of the Act of 1874, whereas I desire to decide it only upon s. 1. I give no opinion upon s. 8. The question arising under that section as to whether a rent-charge can

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be said to be a "sum of money charged upon or payable out of any land" is a very arguable point, and the fact that a rent-charge is dealt with by s. 1 would rather lead me to suppose that it was not intended to deal with rent-charges under s. 8.

LORD COLERIDGE J. I agree.

Appeal dismissed.

Solicitors for appellants: *Bower, Cotton & Bower, for James Hibbert, Ashton-under-Lyne.*

Solicitors for respondent: *Rawle, Johnstone & Co., for Addleshaw & Sons, Manchester.*

J. F. C.

MARCHANT, APPELLANT *v.* LONDON COUNTY COUNCIL, RESPONDENTS.

1910

May 27.

Revenue—Male Servant—"House Porter"—Porter employed at Block of Flats—Employment in Trade or Business—Revenue Act, 1869 (32 & 33 *Vict. c.* 14), *ss.* 18, 19.

A male servant was employed as porter at a block of residential flats, which were let to different tenants. His duties were to attend, work, and clean the lifts, to keep the brasswork, staircases, front steps, and back yards clean, to take coals to the various flats, to bring down the dustbins by means of trade lifts from each flat, to attend in the hall and open the doors when necessary, and to call cabs or fetch carriages and carry luggage for the tenants:—

Held, that the servant was a house porter and therefore a "male servant" within the definition of that term in s. 19, sub-s. 3, of the Revenue Act, 1869, and that therefore his employer was liable to pay the duty imposed in respect of him by s. 18 of the Act.

There is no general exemption from duty contained in the Revenue Act, 1869, in respect of a male servant employed for the purposes of a trade or business.

Whiteley v. *Burns*, [1908] 1 K. B. 705, considered.

CASE stated by a metropolitan police magistrate.

Two informations were preferred on behalf of the respondents against the appellant under s. 27 of the Revenue Act, 1869, for that he on December 13, 1909, at Douglas House and at Aubrey

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House, both in Maida Hill West, in the borough of Paddington, in the county of London, did employ two male servants, for the employing of whom licences were required, without having proper licences under the Act.

Upon the hearing of the informations the following facts were admitted or proved:—

Douglas House and Aubrey House were two blocks of residential flats, each consisting of a basement, ground floor, and four floors above, situated in Maida Hill West, in the borough of Paddington, in the county of London, and such flats were in the occupation of a number of different tenants. The two blocks of flats were in December, 1909, being managed by the appellant as receiver and manager for and on behalf of the parties entitled to the possession thereof.

On December 13, 1909, the appellant as such manager as aforesaid employed at each of the blocks of flats a male servant as porter. The substantial duties of each of the porters were to attend, work, and clean the lifts, to keep the brasswork, staircases, front steps, and back yards clean, to take coals to the various flats, to bring down the dustbins by means of trade lifts from each flat, to attend in the hall and open the doors when necessary, and to call cabs or fetch carriages and carry luggage for the tenants. These duties were for the most part such as could not be adequately performed by female servants.

A form of agreement (1) was put in for the purpose of shewing

(1) The form of agreement stated that the landlord agreed to let and the tenant to take a suite of rooms in the building, with the use in common with the landlord and his other tenants of the hall, passages, staircases, and lift in the building so far as convenient for access to the rooms, subject to the general regulations contained in the schedule thereto, which should be considered as forming part of the agreement.

The schedule was as follows:—

"GENERAL REGULATIONS.

"The entrance to the building and the care of the entrance will be in the charge of the porter appointed and removed by the landlord.

"Tenants have a right to the services of the porter as hereinafter defined and which are to be performed free of charge, and are as follows:—

"(*a*) To be in attendance in the building or buildings committed to his charge either by himself or some trustworthy assistant.

"(*b*) To work the passenger lift and convey the tenants and their friends up and down from 9.30 A.M. till 11.30 P.M. (The passenger lift

as between landlord and tenant what the duties of the porters were, and as regards any service, such as carrying coals, &c., not specifically mentioned in or required under the powers of the schedule to the agreement, while there was no obligation on the porters to perform them, they were in the habit of so doing by arrangement with the tenants and with the consent and approval of the landlords, provided that their regular duties were not interfered with, but no evidence was adduced to shew whether any remuneration was or was not paid by the tenants to the porters in respect of such services.

On December 13, 1909, the appellant had no licence for either of the porters.

For the appellant it was contended:—

(*a*) That the persons employed were not male servants $\frac{\text{and}}{\text{or}}$ house porters within the meaning of the Revenue Act, 1869, or the Customs and Inland Revenue Act, 1876 (1), or any other statute in such case made and provided.

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shall not be used for tradespeople or servants or for the conveyance of bicycles, perambulators, or the like, or luggage. Whenever requisite the landlord shall have a reasonable time allowed for repairing and re-adjusting the machinery.)

"(*c*) To cleanse the general stairs, passages, and lifts, and entrances attached to the section, and attend to the lighting therein.

"(*d*) To receive and deliver to the tenants parcels and messages.

"*Note.*—The above regulations may be altered or modified by the landlord from time to time as circumstances may require, but not so as to reduce the services to be rendered by the porter as aforesaid. The porter is not allowed to render any private service to tenants except as above mentioned."

(1) 32 & 33 Vict. c. 14, s. 18, imposes a duty of 15*s.* for every "male servant," such duty to be paid annually upon licences to be taken out by the person who shall employ the servant.

Sect. 19, sub-s. 3: "The term 'male servant' means and includes any male servant employed either wholly or partially in any of the following capacities; that is to say, maître d'hôtel, house steward, master of the horse, groom of the chambers, valet de chambre, butler, under butler, clerk of the kitchen, confectioner, cook, house porter, footman, page, waiter, coachman, groom, postilion, stable boy or helper in the stables, gardener, under gardener, park keeper, game keeper, under game keeper, huntsman, and whipper-in, or in any capacity involving the duties of any of the above descriptions of servants, by whatever style the person acting in such capacity may be called."

39 & 40 Vict. c. 16, s. 5: "The term 'male servant' as used in the Act of the thirty-second and

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(*b*) That the said Acts had upon a proper construction thereof no application to the present case.

(*c*) That the appellant was not a person employing any male servant or the employer of any male servant within the meaning of the Acts.

The respondents contended to the contrary.

The magistrate held that the two male servants were house porters, or at any rate had to perform most of the duties of a house porter, and were male servants within the meaning of the Acts. He also held that, inasmuch as the appellant was the person who in fact employed the porters, he was bound to have a licence for them, although he was acting as receiver and manager for a mortgagee, and he accordingly convicted the appellant, and imposed a penalty of 5*s*. and ordered him to pay 2*s*. for costs in respect of each information.

Moresby, for the appellant. Sects. 18 and 19 of the Revenue Act, 1869, do not apply to a male servant who is necessarily employed for the purposes of a trade or business: *Whiteley* v. *Burns*. (1) These porters, even if they are house porters and therefore come within the definition of "male servant" in s. 19, sub-s. 3, of the Act, are necessarily employed in the business of letting the flats to tenants for profit. The erection and the management of these flats for the purpose of making a profit constitute the carrying on of a business: *Smith* v. *Anderson* (2); *Bompas* v. *King*. (3) The employment of the porters was necessary for the proper carrying on of the flats, as the lift had to be worked, the brasswork and staircases cleaned, and the coal sent up to the various flats. The expenses of the porters are

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thirty-third years of Her Majesty's reign, chapter fourteen, shall not include a servant who, being bonâ fide employed in any capacity other than the capacities specified or referred to in provision numbered three of section nineteen of the said Act, is occasionally or partially employed in any of the said capacities so specified or referred to, and shall not include a person who has been bonâ fide engaged to serve his employer for a portion only of each day and does not reside in his employer's house."

(1) [1908] 1 K. B. 705.

(2) (1880) 15 Ch. D. 247, at pp. 258, 260.

(3) (1886) 33 Ch. D. 279, at pp. 288, 289, 291.

necessary outgoings for the purpose of earning profits in the business. The porters are upon that ground exempt from the duties imposed by s. 18 of the Act.

Even if they are not exempt upon that ground, they are not "house porters" within s. 19, sub-s. 3, of the Act of 1869. A porter is either a carrier of burdens or the keeper of the entrance to a house. These men have duties to perform outside either of those two classes, such as cleaning brasswork, staircases, front steps, and back yards, bringing down dustbins, and working the lift. Though they may be partially employed as house porters, the main part of their employment is not as house porters, or in any capacity specified in s. 19, sub-s. 3, of the Act of 1869, and that being so they are exempt from taxation by virtue of s. 5 of the Customs and Inland Revenue Act, 1876: *Yelland* v. *Winter*. (1)

Next, if these men are "male servants" within the Act, the appellant is not their employer. He is the receiver and manager for the mortgagee, and therefore is merely an agent for a known principal. He entered into the contract of employment as such agent, and at common law his principal was the employer of these porters. This is a question of taxing the subject, and the statute should be construed strictly.

F. F. Daldy, for the respondents. The decision in *Spencer* v. *Sheerman* (2), where it was held that an extra waiter employed for a time by an hotel-keeper at his hotel was taxable as a "male servant" under ss. 18 and 19 of the Revenue Act, 1869, shews that there is no implied exemption in the case of a servant, who comes within one of the classes specified in s. 19, sub-s. 3, because he is employed in a trade or business; and by s. 4 of the Customs and Inland Revenue Act, 1873 (36 & 37 Vict. c. 18), an hotel-keeper, a retailer of intoxicating liquor, and a refreshment-house keeper are expressly exempted from the obligation to take out a licence under s. 18 of the Act of 1869 "for any servant wholly employed by him for the purposes of his business." In the interests of those particular trades or businesses the Legislature had to enact a special exemption. Accordingly there is no implied general exemption in respect of male servants employed

(1) (1885) 53 L. T. 912. (2) (1871) 23 L. T. 873.

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in a trade or business. The only question is whether the servant is employed in any one of the capacities specified in s. 19, sub-s. 3, of the Act of 1869, and if he is so employed, then his employer must pay the duty unless he can shew that the servant comes within the provisions of s. 5 of the Customs and Inland Revenue Act, 1876, or that some subsequent statute has specially exempted the particular employment in which he is engaged. *Spencer* v. *Sheerman* (1) was not cited in *Whiteley* v. *Burns* (2), and any dicta in this latter case tending to shew that there may be an implied exemption in the case of a male servant employed in trade or business ought not to be followed. Even if there is an exemption in the case of a servant employed in a trade or business, there is no trade or business here. It is an ordinary user of land by a landlord who lets it and the buildings on it to tenants. The duty of the appellant as receiver and manager for the mortgagee is merely to recover the principal and interest advanced. There was evidence here upon which the magistrate was entitled to find that these two servants were house porters. The Court must have regard to the modern duties of a porter at a block of flats, and not the ancient duties of a gatekeeper at a mediæval castle. The duties of these servants are those ordinarily performed by porters at blocks of flats.

With regard to the point that the appellant is not the employer of these two porters, there is no finding of fact by the magistrate to that effect. The magistrate, on the contrary, has found as a fact that the appellant employed these men, and there was evidence to support that finding. It is the duty of the appellant as the manager of the buildings to engage and dismiss the porters, and the persons to whom the duties are payable can only look to him for payment of the duties, and cannot be required to take proceedings against a series of mortgagees for whom the appellant may be receiver and manager. The decision of the magistrate was therefore right.

Moresby in reply. By s. 24, sub-s. 2, of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), a receiver appointed by a mortgagee is deemed to be the agent of the mortgagor, and therefore the Revenue authorities are not under

(1) 23 L. T. 873. (2) [1908] 1 K. B. 705.

the necessity of finding out the various mortgagees for whom the receiver is acting, but may proceed against the mortgagor.

LORD ALVERSTONE C.J. The statement in the case as to the employment of these two men is that the appellant, as manager and receiver, employed at each of the blocks of flats a male servant as porter. It must be taken that the appellant was acting as receiver and manager for the mortgagee, and if the case had stated that he only contracted as agent or that he only contracted for and on behalf of the mortgagee, there might have been some ground upon which to contend that the appellant was not the employer of these porters. Upon the finding in the case that the appellant employed these porters, there being no finding that he employed them as agent, we ought not, if we think that the duty is payable in respect of these servants, to say that the appellant is not the proper person to pay it. The case merely states that the two blocks of flats were managed by the appellant as receiver and manager for and on behalf of the parties entitled to the possession thereof, and there are many cases in which such a receiver and manager must necessarily pledge his own credit, as, for instance, for the articles which are in daily use in the house which he is managing. If the point is to be raised that the appellant here is not the employer of these porters, and therefore is not the proper person to take out the licence and to pay the duty, I think that it should be raised in a more definite way. Upon the question of employment, therefore, my decision is against the appellant, and if the duty is payable he is the person who must pay it.

That brings me to the main question in the case, whether the duty is payable in respect of these men. They were employed as porters, and their substantial duties are stated to be to attend, work, and clean the lifts, to keep the brasswork, staircases, front steps, and back yards clean, to take coals to the various flats, to bring down the dustbins by means of trade lifts from each flat, to attend in the hall and open the doors when necessary, and to call cabs or fetch carriages and carry luggage for the tenants. It is urged, and I will deal with this point first, that the greater part of the time of these men is occupied in the

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performance of duties which are not part of the duties of a "house porter," who, it is said, is properly a keeper of the entrance door of a house or a bearer of burdens, and that therefore no duty is payable in respect of them. I cannot come to that conclusion in the face of the magistrate's finding that these men were house porters, or at any rate had to perform most of the duties of house porters, and were male servants within the meaning of the Acts. It seems to me that the greater part of these duties, if not all of them, are such as in modern times would be performed by a house porter. If it is going to be suggested that such a substantial part of the time of these men is occupied in the performance of duties which do not bring them within one of the classes specified in s. 19, sub-s. 3, of the Revenue Act, 1869, the appellant ought to have obtained from the magistrate a much more specific finding. The appellant must bring himself within the provisions of s. 5 of the Customs and Inland Revenue Act, 1876, which enacts that the term "male servant" in the Act of 1869 "shall not include a servant who, being bonâ fide employed in any capacity other than the capacities specified or referred to in provision numbered three of section nineteen of the said Act, is occasionally or partially employed in any of the said capacities so specified or referred to." The appellant ought to have obtained from the magistrate a finding that their duties as house porters were such as would occupy a comparatively small part of their time, their main duties being those not appertaining to any of the classes of servant specified in s. 19, sub-s. 3, of the Act of 1869. From what is common knowledge about the position of porters at blocks of residential flats, it seems reasonably clear that these men were at the flats all day and up to a late hour at night performing the duties of house porters, that is to say, working the lifts for the residents and their visitors and doing the other duties specified in the case. It is impossible to hold that the greater part of the duties of these men was such as not to render their employer liable to take out a licence for them and to pay the duty.

It is then said that, assuming that these men are house porters within the meaning of the Act, yet, inasmuch as the appellant was managing the flats for the mortgagee, he was

carrying on the business of a flat owner, and the porters were employed, and necessarily employed, for the purposes of that business, and were therefore exempt from the duty. I am unable to find any language in the Revenue Act, 1869, which creates that exemption. If these men are house porters, I do not think that there is any authority which justifies us in saying that the employer is exempt from paying the duty in respect of them because they are employed as porters at a block of residential flats, which are separate tenements. If that is to be an exemption, it seems to me to require express statutory provision. It is not said that there is any express exemption in the statute itself, but reliance is placed on behalf of the appellant upon some general principle which, it is said, was laid down in *Whiteley* v. *Burns*. (1) The decision in *Whiteley* v. *Burns* (1) seems to me to have been misunderstood. That case dealt mainly with male servants who were said to come within the word "waiters" in s. 19, sub-s. 3, of the Revenue Act, 1869. The facts in that case were that Messrs. Whiteley had a large number of shop assistants who had their meals on the premises, and a certain number of men, thirty in number, waited upon them at their meals. It was contended on behalf of the Crown that these men who waited upon the shop assistants at their meals were "waiters" within the meaning of s. 19, sub-s. 3, of the Act of 1869. A very large part of the duties performed by these men were not such as would have rendered Messrs. Whiteley liable to pay the duty in respect of them. The real point in that case was that, though these men were employed to wait upon the shop assistants, it was only a small part of their duties, and therefore they did not come within the category of "waiters" in the section. Undoubtedly it was put forward as one ground of exemption there that the duty on male servants was intended to be imposed as a tax upon luxuries, and therefore it was intended to impose the duty only in respect of male servants who were employed in private houses and not in a trade. I do not think that it was necessary in that case to lay down as a general principle that male servants employed for the purposes of a trade are

(1) [1908] 1 K. B. 705.

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exempt from the tax, for, if such an exemption exists, the special statutory trade exemptions, to which the Attorney-General referred in that case, would be unnecessary. All that I intended, and I think all that the Court intended, to decide in that case was that Messrs. Whiteley were not liable to pay the tax because a great part of the duties of the servants were not such as would have rendered the employers liable to pay the tax, though during some small portion of the day they performed some service of waiting. They were not "waiters" within the contemplation of the Act. The same reasoning seems to me to apply to the five other servants in that case.

In my opinion the magistrate was right in saying that these servants are house porters. If not the whole, by far the greater part of their duties are those of house porters, and the appellant, who employed them, is liable to pay the duty. The appeal must be dismissed.

CHANNELL and LORD COLERIDGE JJ. agreed.

Appeal dismissed.

Solicitors for appellant: *Marchant & Newington.*
Solicitor for respondents: *E. Tanner.*

W. F. B.

KINAHAN & CO., LIMITED *v.* PARRY AND OTHERS.

1910
June 1.

Principal and Agent—Undisclosed Principal—Manager of Hotel—Licence taken out in Name of Manager—Presumption as to Hotel being tied—Liability of Owners for unauthorized Purchase of Spirits by Manager.

The defendants, who were the owners of an hotel, appointed a manager of the hotel; the licence was taken out in the name of the manager, whose name also appeared over the door. The manager had been told by the defendants to order spirits from a certain brewery (with which the plaintiffs were in no way connected) and from no other place, but, in contravention of his instructions, the manager ordered whisky from the plaintiffs. The plaintiffs, who did not know that the defendants had prohibited the manager from buying spirits from any other place than the particular brewery, supplied the whisky to the manager at the hotel and gave credit to him only. Subsequently, upon discovering that the defendants were the real owners of the hotel, the plaintiffs sued them for the price of the whisky:—

Held, that the plaintiffs were entitled to maintain the action, inasmuch as there is no presumption, where a person deals with the licensee of an hotel and knows nothing of the real owner, that the licensee is a mere manager with limited authority and that the hotel is tied.

Where a person is the licensee of an hotel and is known to be the licensee, and nothing is brought to the attention of a seller to indicate to him that the position of the person with whom he is dealing is that of a mere manager of a tied house, the seller who trades with the licensee as a principal and afterwards discovers that he is an agent is entitled to sue the real principal when disclosed, notwithstanding any limitation placed by the principal on the authority of the licensee.

Watteau v. *Fenwick*, [1893] 1 Q. B. 346, followed.

Daun v. *Simmins*, (1879) 41 L. T. 783, distinguished.

APPEAL by the plaintiffs, Messrs. Kinahan & Co., Limited, from a judgment of the deputy judge of the Glamorganshire County Court holden at Cardiff.

The action was brought in the county court to recover 11*l.* 13*s.* 2*d.*, the balance of an account for whisky sold and delivered.

The whisky was supplied to the Carne Park Hotel, of which the defendants, who traded as the Carne Park Hotel Syndicate, were owners. One A. J. Mortimer was the licensee of the hotel, and his name appeared over the door of the hotel as the person licensed to sell wines, spirits, ale, porter, cider, and tobacco to be

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consumed on or off the premises. Mortimer was in fact the manager only of the hotel. He had been appointed by the defendants and had in fact no authority to obtain the whisky from the plaintiffs, having been expressly told by the defendants to order spirits from a certain brewery (with which the plaintiffs were in no way connected) and from no other place. The plaintiffs did not know that Mortimer was a manager only, nor that he had been prohibited from obtaining spirits except from the particular brewery. Mortimer ordered the whisky from the plaintiffs, and they gave credit to Mortimer only. The whisky was invoiced to him and he took delivery of it at the Carne Park Hotel.

Upon subsequently discovering that Mortimer was manager for the defendants the plaintiffs brought the present action.

The deputy county court judge gave judgment for the defendants, holding that in *Daun* v. *Simmins* (1) and *Watteau* v. *Fenwick* (2) the facts were in substance indistinguishable from those in the present case, but that, as in *Daun* v. *Simmins* (1) judgment was given for the defendant and in *Watteau* v. *Fenwick* (2) for the plaintiff, he must elect as to which of those two decisions he would follow, and he preferred to follow the decision in *Daun* v. *Simmins*. (1)

The plaintiffs appealed.

E. G. Palmer, for the plaintiffs. The decision in *Daun* v. *Simmins* (1) is distinguishable. In that case the proprietor of the hotel and not the manager was the licensee. Therefore any one going to the hotel would know that the person who was not the licensee but who was conducting the business of the hotel was a manager only, and would be put upon inquiry as to the extent of his authority and as to whether the house was a tied house. In the present case Mortimer was the licensee and his name was over the door. The plaintiffs therefore had no means of knowing, and in fact did not know, that he was not the proprietor of the hotel, or that his authority was limited in any way. The present case is governed by the decision in *Watteau* v. *Fenwick*. (2)

(1) 41 L. T. 783. (2) [1893] 1 Q. B. 346.

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J. Sankey, K.C., and *Wilfred Lewis*, for the defendants. It is a matter of general notoriety that most public-houses and hotels are tied for beer and spirits. The plaintiffs were therefore put upon inquiry as to the extent of Mortimer's authority. The presumption that a house is tied as regards spirits is much stronger than that it is tied as to cigars, and on that ground *Watteau* v. *Fenwick* (1) is distinguishable. Moreover in that case the licensee had authority to buy certain things. In the present case he had none. The plaintiffs were not justified in presuming that Mortimer had authority to buy beer and spirits in the absence of any evidence to that effect. The deputy county court judge was therefore right in following the decision of the Court of Appeal in *Daun* v. *Simmins* (2) rather than that of the Divisional Court in *Watteau* v. *Fenwick*. (1)

PICKFORD J. In this case the deputy county court judge nonsuited the plaintiffs, who sued the defendants for the price of some whisky delivered at the Carne Park Hotel. The defendants traded as the Carne Park Hotel Syndicate, and they were the owners or lessees of the Carne Park Hotel and had put in as their manager a man named Mortimer, who was the licensee of the hotel, and his name appeared over the premises as licensee. The plaintiffs supplied whisky to the hotel, and it was admitted before the deputy county court judge that Mortimer had been told to buy spirits from a certain brewery only, the plaintiffs not being the firm specified. It was also admitted that this fact was not communicated to the plaintiffs, so that all they knew was that Mortimer's name appeared as licensee. He was the person with whom they dealt and to whom they gave credit, and they knew nothing of the defendants. The deputy county court judge held in these circumstances that the plaintiffs were not entitled to recover in the action. Two cases were cited to him, namely, *Daun* v. *Simmins* (2) and *Watteau* v. *Fenwick*. (1) These cases are extremely alike and both are very difficult to distinguish from the present case. *Daun* v. *Simmins* (2) was decided by the Court of Appeal, and *Watteau* v. *Fenwick* (1) is a more recent decision of the Divisional Court, *Daun* v. *Simmins* (2) not being cited to that Court.

(1) [1893] 1 Q. B. 346. (2) 41 L. T. 783.

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In *Daun* v. *Simmins* (1) the facts were these: The defendant was the owner of a public-house and also the licensee, and his name appeared on the premises in that capacity. One Clarke was his manager, and Clarke bought certain goods from the plaintiffs, and it was held that the plaintiffs could not recover from the defendant. There were other facts in the case which I think it is unnecessary to consider because they did not form any part of the ground of the judgments. The Court of Appeal held, affirming the decision of Denman and Lopes JJ., that there was no evidence of authority on the part of Clarke to bind the defendant. That decision seems to have been based to a considerable extent upon the ground that it is common knowledge that public-houses are often tied and that a manager cannot be presumed to have unlimited authority to buy spirits from anybody he chooses. In *Watteau* v. *Fenwick* (2) the defendants were the owners of the business of a beer-house and appointed one Humble as their manager. The licence was taken out in the name of Humble and his name appeared over the door. By an agreement between himself and the defendants all articles for the business were to be supplied by the defendants except bottled ales and mineral waters, and with those two exceptions Humble had no authority to buy anything elsewhere. In fact he bought cigars, bovril, and other articles from the plaintiff, and the county court judge gave judgment for the plaintiff for the price of the cigars and bovril. That judgment was affirmed by the Divisional Court consisting of Lord Coleridge C.J. and Wills J. Wills J. in a written judgment which was read by Lord Coleridge C.J., who concurred in it, said: "I think that the Lord Chief Justice during the argument laid down the correct principle, viz., once it is established that the defendant was the real principal, the ordinary doctrine as to principal and agent applies—that the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority." Earlier in the judgment Wills J. said that the cigars "were such as would usually be supplied to and dealt in at such an establishment." The Court

(1) 41 L. T. 783. (2) [1893] 1 Q. B. 346.

there held that the authority conferred upon Humble and the position he was placed in, so far as concerned the plaintiff, made the defendants liable for the goods he had purchased. It is a difficult question which of these two authorities we ought to follow. The deputy county court judge preferred *Daun* v. *Simmins* (1), but we feel bound to follow the decision in *Watteau* v. *Fenwick*. (2) We think there is a material distinction between the present case and *Daun* v. *Simmins* (1) by reason of the fact that in that case Clarke was known to be a manager and a manager only, and was known not to be the licensee. It was therefore known that there might be some limitation placed upon his authority. In *Watteau* v. *Fenwick* (2) Humble was in the position occupied by Mortimer in the present case. For that reason I think that *Watteau* v. *Fenwick* (2) is the authority which governs the present case, and not *Daun* v. *Simmins*. (1) There may be other points of distinction between *Daun* v. *Simmins* (1) and the present case, but I think that for the purpose of our decision that distinction is sufficient.

LORD COLERIDGE J. I agree. The action was brought against the defendants, who had appointed a man named Mortimer as their agent or manager at their hotel, which was a tied house. The defendants' case rests upon the proposition that whoever supplies goods to a person in Mortimer's position is bound to infer—notwithstanding the fact that he is the licensee of the hotel or public-house—that the person so supplied is a manager only and that he is the manager of a tied house with all its limitations. If the facts in the present case had been in all respects similar to those in *Daun* v. *Simmins* (1), then, whatever might have been my own private view of the law, I should have been bound by the decision in that case. There the person supplied with the goods was a man named Clarke, who was not the licensee of the premises, and was known not to be the licensee, and it was upon those facts that the Court of Appeal held that the person who supplied Clarke must be deemed to have known that he was supplying a manager and a manager only, and, inasmuch as the majority of managers are bound by

(1) 41 L. T. 783. (2) [1893] 1 Q. B. 346.

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Lord Coleridge J.

restrictions as to whom they shall deal with, the case failed against the proprietor, who was the licensee of the premises, because the limitation placed upon the authority of Clarke must be inferred from the fact that he was not the licensee. To uphold the decision of the deputy county court judge in the present case, however, would involve the acceptance of the principle that where a person deals with the licensee of a public-house who is known to be a licensee by the seller, the latter must presume the licensee to be not the tenant of the premises, but a mere manager, and, in addition, the manager of a tied house. In my opinion there is no such presumption in law. Where a man is the licensee and is known to be the licensee, and nothing is brought to the attention of the seller to indicate to him that the position of the person with whom he is dealing is that of a mere manager of a tied house, the seller who trades with the licensee as a principal and afterwards discovers that he is an agent is entitled, in my opinion, to sue the real principal when disclosed, notwithstanding any limitations on the authority given to the agent by the principal. For these reasons it seems to me that *Daun* v. *Simmins* (1) is distinguishable, and that the present case is more nearly covered by *Watteau* v. *Fenwick* (2), although the facts in that case were not precisely the same. For these reasons I think the decision of the deputy county court judge was wrong and that this appeal must be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Mills, Curry & Gaskell, for J. T. Phœnix, Cardiff.*

Solicitors for defendants: *Smith, Rundell & Dods, for Morgan, Bruce, Nicholas & James, Pontypridd.*

(1) 41 L. T. 783. (2) [1893] 1 Q. B. 346.

J. E. A.

CONSOLIDATED TEA AND LANDS COMPANY AND OTHERS *v.* OLIVER'S WHARF.

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April 6.

Wharfinger— Carriage of Goods by Lighter from Ship to Warehouse—Limits of Liability of Wharfinger.

Wharfingers who, as incidental to their business as wharfingers, transport goods for their customers by lighter from the importing ships to their warehouse, but do not hold themselves out as ready to carry goods for any other persons, are not in respect of that transport subject to the common law liability of common carriers, but are liable only for negligence.

TRIAL before Hamilton J. of preliminary question of liability.

The defendants were the owners of a bonded warehouse, and their business was to land and warehouse tea for tea importers upon the terms of a schedule of charges issued by an association called the Tea Clearing House. The several rates specified in the schedule varied according to the size of the package and the services rendered. The highest of these rates, called the management rate, was charged in respect of services which included collecting the tea on board ship, carrying it by lighter to the defendants' wharf, and there housing it until required for delivery; and this rate in respect of the largest packages, namely, those over 200 lbs. in weight, was 2*s.* 7*d.* per package. The charge was an exclusive one, and no abatement from it was made in cases in which the importers did their own lightering. The defendants did not themselves own lighters, but employed lightermen to carry the goods on their behalf from the importing ships to the warehouse. On January 18, 1909, the plaintiffs the Consolidated Tea and Lands Company employed the defendants to take delivery of 441 chests of tea ex the steamship *Clan Graham* in the Port of London, to carry them to their warehouse, and there warehouse them on the terms of the management rate, and the plaintiffs Octavius Steel & Co. employed the defendants to deal similarly with another parcel of 233 chests. The defendants duly collected the tea on behalf of the plaintiffs and loaded it

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upon the barge *Delta*. Whilst the *Delta* was proceeding to the defendants' warehouse she was sunk by collision with a steamship and the tea was damaged. The action was brought to recover damages for the loss thereby sustained, and on the application of the plaintiffs the judge directed that the issue whether the defendants undertook the liability of common carriers with respect to the plaintiffs' tea should be tried as a preliminary question.

Scrutton, K.C., and *Leck*, for the plaintiffs. The defendants held themselves out as ready to carry tea by lighter for any one of a particular class of persons, namely, those who were going to be customers of the warehouse. In so doing they exercised a public employment, and therefore, in the absence of a special agreement limiting their liability, were bound to answer for the goods at all events. In *Liver Alkali Co.* v. *Johnson* (1) a barge-owner who let out his vessels for the conveyance of goods to any customers who applied to him was held to be liable for the loss of any goods that were conveyed by him, even though they were lost without any negligence on his part, and though he was not a common carrier in the sense of being bound to accept for carriage any goods that were tendered to him. Similarly in *Hill* v. *Scott* (2) a shipowner who carried goods by sea from London to Goole, in Yorkshire, without a bill of lading was held to be liable for damage to the goods without proof of negligence. The fact that here the defendants are warehousemen as well as carriers does not affect the extent of their liability in the latter capacity. They are in the same position as railway companies who, in the absence of special contract, are absolutely liable for the safety of goods carried by them during the period of transit, and after the goods have arrived at their destination, and the consignees have failed to fetch them away within a reasonable time, become warehousemen, and exchange the liability of common carriers for that of ordinary bailees for reward. In *Maving* v. *Todd* (3) the defendants were wharfingers and lightermen, and goods entrusted to them by the plaintiff were whilst on their premises

(1) (1874) L. R. 9 Ex. 338. ibid. 713.
(2) [1895] 2 Q. B. 371; on appeal,
(3) (1815) 1 Stark. 72.

accidentally destroyed by fire. The question was whether the defendants, whose duty it was to convey the goods from the wharf in their own lighters to a vessel in the river, were liable for the loss. Lord Ellenborough is there reported to have expressed the opinion "that the liability of a wharfinger whilst he has possession of the goods was similar to that of a carrier" —a proposition which was no doubt meant to be confined to a case in which the goods were received on the wharf with a view to their being carried by lighter. [He also referred to *Chattock* v. *Bellamy*. (1)]

Hume Williams, *K.C.*, and *H. G. Robertson*, for the defendants. The carriage by lighter from the ship to the warehouse is purely incidental to the defendants' business as warehousemen. They make no charge for it, for the management rate is the same whether the defendants do the lightering or the customers do it themselves. The cost of lightering to those customers who did it themselves would be about 2*d.* per package, a sum which would bear but a small proportion to the management rate of 2*s.* 7*d.* The case of *Liver Alkali Co.* v. *Johnson* (2) is distinguishable from the present case in many particulars. There the defendant was ready to carry for any person, not merely for a particular class of persons; the customer fixed the destination of the goods; and the defendant owned the barges. Here the defendants only carry for a particular class of persons; they carry only to one destination, namely, their own warehouse; and they do not own the lighters. In *Ingate* v. *Christie* (3) Alderson B. said that the test whether a lighterman who carries goods from the wharves to the ships in harbour is a common carrier is whether he carries for particular persons or for all indifferently.

Scrutton, *K.C.*, in reply.

HAMILTON J. The barge *Delta*, having on board two parcels of tea, one the property of the Consolidated Tea and Lands Company, and the other the property of Octavius Steel & Co., was on January 29, 1909, run down in the Thames, and the tea was greatly damaged. The tea had been collected by the defendants

(1) (1895) 64 L. J. (Q.B.) 250. (2) L. R. 9 Ex. 338.
(3) (1850) 3 Car. & K. 61.

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from the import steamer in the Tilbury Docks, and was being taken in the *Delta*, in which they had placed it, to one or other of the defendants' warehouses. To save the trouble and expense of coming to trial prepared to deal with the issue that the loss was caused by the negligence of some one for whom the defendants were responsible, as the plaintiffs contended that the defendants were responsible in any event, an order was made that a preliminary issue should be tried as to whether the defendants had undertaken the liabilities of common carriers with regard to the tea in question. The facts do not appear to be in dispute. The defendants have for a long time past been in the habit of offering to perform certain services for importers of tea upon terms which, so far as they are expressed, appear to be represented by a schedule of charges which they circulate; and in the present case one of the plaintiffs by an express request for the services to which the schedule of charges applies, and the other by an implied request arising from the course of business, requested the defendants to deal with their tea upon the terms of their "management rate," which is a rate per package varying according to the weight, and in the case of the heaviest packages is 2*s.* 7*d.* The services which it is admitted were to be rendered for that management rate consisted of presenting the bill of lading to the import ship, collecting the tea, causing it to be transported to one of the defendants' bonded warehouses, and there performing various services in the nature of warehousing and otherwise until the time arrived for delivery to the owners. I was told that out of the charge of 2*s.* 7*d.* the sum that would represent the cost of transporting the tea by water would be 2*d.*, and although that is not admitted, it is not contended that the charge for the transport by water in the case of the heaviest packages would be a large proportion of the 2*s.* 7*d.* It is common ground that the defendants carry on this course of business incidentally to their business as warehousemen. It is no doubt convenient for their customers that the defendants should collect their tea for them from the ship; but it is only for customers who desire to have their tea warehoused in the defendants' warehouse that the defendants under their management rate procure the tea to be carried at all. They do

not carry from one terminus to another without consideration of what those termini are; they do not carry except to their own warehouse, and, as I understand, only from the import ship. They do not own any barges, but by means of a sub-contract with lightermen they arrange for the transportation of the tea from the steamer to the warehouse. The liability of the defendants in respect of this transportation rests upon the rule which was established after much discussion in *Liver Alkali Co.* v. *Johnson* (1), and the gist of that decision was that if the defendants were exercising the public employment of carrying goods by water, which was a question of fact, then there would be attached to that employment the same liability with regard to the safety of the goods as the law imposes upon common carriers. The question whether the defendants in the present case exercised the public employment of carrying goods by water is one which I think on the facts must be answered in the negative. In the *Liver Alkali Co.'s Case* (1) the defendant, who was found to exercise this public employment, not only owned the flats, but sent them out under the care of his own servants plying about to or from places in the Mersey indifferently both as to the points of departure and as to the points of arrival. Although he always carried goods for one person at a time, and made an express agreement with that person for the voyage, it was clear that every one who had goods to be carried was a possible customer. Not being a common carrier, he was not compellable by law to take the goods of the first comer, but he held himself out in the ordinary course as ready to do business with all and sundry. So far the facts were widely different from those of the present case. It appears to me to be manifest, upon the present facts, that the carriage by water is purely ancillary to the warehousing business, and is a relatively small part of it; that it is undertaken by the defendants principally as an inducement to persons, who have tea delivered to them at considerable distances, to allow it to go into the defendants' bonded warehouses instead of into some nearer warehouse; and so far from the defendants

(1) L. R. 9 Ex. 338.

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exercising the public employment of carrying goods by water they appear to me to carry on the business of warehousemen alone. They confine themselves to a limited clientèle, and render a subsidiary service not for the purpose of making that service a branch of their business, but for the purpose of procuring customers for the business which they substantially carry on. No case has been cited to me in which the facts resembled the present and in which the defendant was held liable. In one case, *Chattock* v. *Bellamy* (1), the decision was in favour of the wharfingers, who were there held, under circumstances not dissimilar to the present, not to carry by water as a public employment, inasmuch as they did not undertake to carry the goods of every one who asked them or hold themselves out as being ready to do so. Reference has been made to a case of *Maving* v. *Todd*. (2) In Starkie's report of that case Lord Ellenborough is alleged to have said that the liability of a wharfinger whilst he has possession of the goods is similar to that of a carrier. That proposition would be indisputably bad law unless the fact was that the goods were only temporarily warehoused by the defendant in order that he might proceed to carry them, and that fact the reporter has omitted to record. In Lord Campbell's report of the case (3) there is no mention of the dictum, presumably because he did not accept it, nor of the fact necessary to support it, presumably because it did not exist. Under those circumstances I cannot found any decision upon that dictum. With regard to the other cases cited, *Ingate* v. *Christie* (4) and *Hill* v. *Scott* (5), they only appear to me to emphasize the rule laid down in *Liver Alkali Co.* v. *Johnson* (6), directing special attention to the distinction between willingness to serve every one who asks and willingness to serve only particular favoured persons, and to the distinction between the carrying on of the public employment of carriers and the mere occasional rendering to the customer of the warehouse the subsidiary service of collecting and carrying his goods from the

(1) 64 L. J. (Q.B.) 250.
(2) 1 Stark. 72.
(3) (1815) 4 Camp. 225.
(4) 3 Car. & K. 61.
(5) [1895] 2 Q. B. 371; on appeal, ibid. 713.
(6) L. R. 9 Ex. 338.

import steamer. The preliminary question must be answered in favour of the defendants.

Judgment for defendants.

Solicitors for plaintiffs : *Ballantyne, McNair & Clifford.*
Solicitors for defendants : *Ashurst, Morris, Crisp & Co.*

J. F. C.

GROVER & GROVER, LIMITED *v.* MATHEWS.

1910
April 14, 15.

Insurance (Fire)—Contract of Fire Insurance made by Agent without Authority —Ratification by Principal after and with Knowledge of Loss by Fire—Whether Ratification valid in Law.

Where a contract of fire insurance is made by one person on behalf of another without authority, it cannot be ratified by the party on whose behalf it is made after and with knowledge of the loss of the thing insured.

ACTION tried in the Commercial Court before Hamilton J. without a jury.

The action was brought to recover a loss under a contract of fire insurance on the plaintiffs' piano factory. The following were the facts material to this report.

The plaintiffs were the owners of a freehold factory at New Southgate called the Apollo Works, where they carried on the business of pianoforte manufacturers. In March, 1908, the plaintiffs by their agent, a Mr. Brows, took out a Lloyd's policy for 1000*l.* on the Apollo Works for twelve months from March 26, 1908, to March 25, 1909, inclusive. This policy was effected by Mr. Brows through Mr. Dott, an insurance broker at Lloyd's, who effected the policy with certain underwriters at Lloyd's at a premium of 12*s.* 6*d.* per cent. On March 4, 1909, Mr. Brows, without any instructions from the plaintiffs, wrote to Mr. Dott, heading his letter "Fire Insurance, Messrs. Grover & Grover, Ltd., 1000*l.*," and saying, "I am not sure that it is customary to send renewal notices in the case of insurances at Lloyd's and shall be glad to hear from you as to this. The present insurance expires on the 25th inst." Thereupon on March 5, 1909, Mr. Dott caused a slip to be prepared upon which the present action was brought. The slip was initialled by a Mr.

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Stearns, who was the defendant's underwriting representative at Lloyd's, and the defendant admitted that if there was a contract of insurance the initialling of the slip by Mr. Stearns bound him (the defendant) to the extent of 50*l.*, the amount insured by him. On March 27, 1909, between 2 and 3 P.M., the plaintiffs' factory was destroyed by fire. Later in the same day Mr. Sydney Grover and Mr. Herbert Grover, two directors of the plaintiff company, had an interview with Mr. Brows in order to do anything that could be done to make it clear that the factory which had been burnt down was insured, and handed to Mr. Brows a cheque for 6*l.* 5*s.*, the amount of the premium on an insurance for a year of the plaintiffs' factory for 1000*l.* at 12*s.* 6*d.* per cent. After that interview Mr. Brows on the same evening sent to Mr. Dott the cheque for 6*l.* 5*s.* (which had been drawn by Mr. H. Grover) enclosed in a letter signed by Mr. Brows and saying "Enclosed please find cheque in payment of premium for current year from 25th inst." Mr. Dott declined to accept the cheque for the premium as it was sent after the loss had occurred. The plaintiffs then commenced the present action.

Various questions arose during the trial, but the only one to which this report relates is whether, assuming that a valid contract of fire assurance had been made through Mr. Brows with the defendant by Mr. Dott on behalf of the plaintiffs, but without their authority, the plaintiffs could ratify it after the loss occurred.

On behalf of the plaintiffs it was contended that the contract of fire insurance had been made by Mr. Dott as agent for the plaintiffs before the loss occurred and was ratified by them on March 27, 1909, and that this ratification, although it took place after the loss occurred, was good in law.

As to this point it was contended for the defendant that ratification of a contract of fire insurance cannot take place after and with knowledge of a loss.

J. R. Atkin, K.C., and *Leck*, for the plaintiffs. If a contract of fire insurance has been made on behalf of a proposed assured, the assured can ratify it after and with knowledge that a loss by fire has taken place: *Williams* v. *North China Insurance Co.* (1)

(1) (1876) 1 C. P. D. 757.

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Bailhache, K.C., and *F. D. Mackinnon*, for the defendant. Ratification of a contract of fire insurance cannot take place after a fire has happened and with knowledge of the loss. It is true that with regard to a policy of marine insurance there can be ratification after loss and with knowledge of it on the part of the assured: *Williams* v. *North China Insurance Co.* (1); Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 86. But the principle does not extend to a life or fire policy. The decision in *Williams* v. *North China Insurance Co.* (1) was expressly based upon the ground that the contract in that case was one of marine insurance. The contract in a policy of marine insurance is a contract to pay whether the subject-matter of the insurance is lost or not lost, and therefore even after loss there can be a ratification of the contract. But the contract of fire insurance assumes that the subject-matter of the insurance is in existence. Therefore a ratification after loss would entirely alter the nature of the contract. [*Pritchard* v. *Merchants' Life Assurance Society* (2) was also referred to.]

J. R. Atkin, K.C., in reply. There is no difference in law between the ratification of a policy of marine insurance and one of fire insurance. In giving judgment in *Castellain* v. *Preston* (3) Bowen L.J. treated fire and marine policies as being upon the same basis with regard to the law applicable to them. He said: "Is there any real distinction here between fire policies and marine policies? It seems to me that the learned judge below, and the American authorities on which he relies, have fallen into the mistake of supposing that the distinction which obtains as to certain incidents of marine policies and fire policies is derived from a difference of principle, and not from the diversity of the subject-matter. In any case the principle of indemnity is the same, and there is no departure from it."

The decision in *Pritchard* v. *Merchants' Life Assurance Society* (2) turned upon the particular words of the policy and has no bearing upon the question whether there can be ratification after loss in the case of a fire policy.

(1) 1 C. P. D. 757.
(2) (1858) 3 C. B. (N.S.) 622.
(3) (1883) 11 Q. B. D. 380, at p. 402.

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HAMILTON J. The ratification of March 27, 1909, whether it is considered as having taken place at the interview between Messrs. Grover and Mr. Brows on that evening or by the letter written on their behalf on the same evening by Mr. Brows, was after the loss, and with knowledge of the loss on the part of the plaintiffs, and it appears to me that the judgments in *Williams* v. *North China Insurance Co.* (1), which is a decision of the Court of Appeal, compel me to say that it was too late for ratification; because, as it appears to me, the Court of Appeal in *Williams* v. *North China Insurance Co.* (1) recognized that a rule which would permit a principal to ratify an insurance even after the loss was known to him was an anomalous rule which it was not, for business reasons, desirable to extend, and which, according to the authorities, had existed only in connection with marine insurance. No case has been cited to me which suggests that this anomalous rule ought to be extended to fire insurance. I think the expressions used in the judgments in *Williams* v. *North China Insurance Co.* (1) shew that the Court of Appeal did not consider that the rule should be extended to cases beyond those to which it had been held to apply. In my judgment expressions which are to be found in the authorities and text-books, and particularly in *Castellain* v. *Preston* (2), which refer to the application of the rules of marine insurance to fire insurance, only mean that both are contracts of indemnity; that marine insurance has been most fully dealt with in judicial decisions; and that, therefore, although those decisions mainly refer to marine insurance, the principles involved in them may, so far as they are incidental to a contract of indemnity as such, and not to the special business of marine insurance, be applicable to both classes of transactions.

Judgment for defendant.

Solicitors for plaintiffs: *B. A. Woolf & Co.*
Solicitors for defendant: *Ballantyne, McNair & Clifford.*

(1) 1 C. P. D. 757. (2) 11 Q. B. D. 380.

J. E. A.

WILSON & COVENTRY, LIMITED *v.* OTTO THORESEN'S LINIE.

1910.
June 10, 15.

Shipping—Charterparty—Demurrage Clause—No Time specified for Demurrage —Rights of Parties.

Where a charterparty provides that if the ship is detained after the expiry of the time limited for loading, demurrage shall be paid at a specified rate, but no time is thereby specified during which she may be kept on demurrage, the ship is not entitled to sail with an incomplete cargo immediately upon the expiry of the loading time, but the charterer is entitled to keep her on demurrage for a reasonable time.

Query whether, if there is no demurrage clause at all, the charterer is entitled to detain the ship for a reasonable time at a reasonable rate of compensation?

TRIAL of action before Bray J. without a jury.

By a charterparty dated August 10, 1909, the defendants chartered their steamship *Salerno* to the plaintiffs to proceed to Calais during December and there load a full and complete cargo of straw, say about 350/400 tons, and being so loaded to proceed to Las Palmas. The charterparty contained the following clauses:—"Cargo to be loaded and discharged as fast as steamer can receive and deliver as customary at respective ports and during customary working hours thereof." "If vessel be longer detained to be paid at the rate of four pence per gross register ton per day." The ship arrived at Calais on the morning of December 28 and commenced loading at 12.30 P.M. the same day. The customary working hours of the port were from 7 A.M. to 5.30 P.M. There were no facilities for storing straw on the quay, and it had to be sent down by the railway when the shipper gave notice that it was wanted. A reasonable time for loading a complete cargo of straw on the *Salerno* would have been, as the judge found, under the circumstances two-and-a-half days, so that the time limited by the contract for completing the loading did not expire until 5.30 P.M. on December 30. The ship was advertised to leave Las Palmas with a cargo of fruit on January 7, and the master, being anxious to arrive at that port in time to leave with his return cargo on the advertised date, sailed from Calais at 4 P.M. on

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December 30. At that time, owing to delay in consequence of the plaintiffs not having the cargo ready to load, she had only loaded 209 tons. If she had waited till 5.30 on the following day more straw would have come down by the railway and the ship could have loaded an additional quantity of 136 tons. The action was for breach of the charterparty by reason of the ship leaving Calais before she had loaded a complete cargo, whereby the plaintiffs lost the profit they would have made by the sale of the straw at Las Palmas. The defendants contended that they were not bound to wait at Calais beyond the time which was sufficient for loading a full cargo if it had been ready, and they counterclaimed for dead freight.

Greer, for the plaintiffs. Assuming that the plaintiffs were in default in not completing their loading within the time limited by the charterparty, the defendants were bound to do what was reasonable to mitigate the loss resulting from that default; and the ship ought to have waited for a reasonable time on demurrage to give the plaintiffs a chance of completing the loading.

Adair Roche, for the defendants. There is nothing in the contract which required the ship to wait in the port after the loading time had expired. The provision for payment of demurrage at a particular rate only liquidates the damages which the shipowner will suffer by the detention of the ship if he elects to wait, but it does not oblige him to wait. In Carver on Carriage by Sea, s. 270, it is said that "the ship ought to stay during the agreed days on demurrage, if any, unless the charterer has refused to load." But in the absence of any agreement as to time the ship is not bound to wait on demurrage at all.

Cur. adv. vult.

June 15. BRAY J. read the following judgment:—In this case the plaintiffs were the charterers and the defendants were the owners of the vessel called the *Salerno*. The charterparty was dated August 10, 1909, and it provided that the vessel should proceed to Calais and there load a cargo of 350 to 400 tons of straw. The plaintiffs allege that the ship sailed from Calais

before the proper time, and that in consequence she was not fully loaded, and they thereby lost the profit which they would have made in respect of the carriage of the straw from Calais to the Canary Islands. The defendants counterclaimed damages for dead freight. The evidence was in conflict on several points; it is therefore necessary that I should state the material facts as I find them.

Prior to August 10, 1909, the date of the charterparty, I find that the usual time occupied in loading a vessel with 400 tons of straw was three days, and the shipowner was content to accept that as a reasonable time, knowing probably the delays on the part of the railway company in getting the trucks down, but if the trucks were sent down by the railway company so that the straw could be loaded as fast as the ship could receive it I find that the 400 tons could be loaded in less than three days. I do not think they could be loaded in two days except under great pressure. I think the normal time under the circumstances would have been two-and-a-half days. When the ship left at 4 P.M. on December 30 that time had not expired, and I find as a fact that the ship did leave before the time allowed by the charterparty for loading had expired. I find that two waggons containing about 23 tons arrived in time to be loaded that night, or at all events before the time expired. I find further that waggons containing 70 tons arrived that night, and that 43 tons were on their way and would have arrived early on the morning of the 31st, and that if the ship had stayed till 5.30 P.M. on the 31st she could have loaded 136 tons beyond what she actually took, but that that would have entitled the ship to one day's demurrage, which at 4*d.* per ton as provided by the charterparty would have amounted to 25*l.* 17*s.* 4*d.* I also find that the damages sustained by the charterers in respect of the straw which the ship ought to have loaded and did not load amounted to 8*s.* per ton. I am satisfied by the plaintiffs' evidence that they could not have sent the straw by another ship.

I now have to consider the rights and liabilities of the parties having regard to the above findings. First it is plain that the defendants broke their contract by the ship sailing before the loading time expired, and that the plaintiffs are entitled to

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Bray J.

some damages. I think those damages partly depend on whether the ship was entitled to leave immediately after that time expired without waiting on demurrage. It was contended on the part of the defendants that the ship was entitled to leave, even if not fully loaded, at the expiration of the time allowed for loading. It is curious that there is so little authority on the point. If the contention is sound it entails a very heavy penalty on the charterer; he will lose his profit on the carriage of a part of his cargo, and in addition he may have to pay a large sum to the shipowner for dead freight, whereas if the ship is detained in order to finish the loading all he has to pay is either an agreed sum or a reasonable sum to compensate the shipowner for the delay, and the shipowner receives the agreed or a proper compensation. In my experience it is quite contrary to practice for the ship to leave when by waiting a short time she could get her full cargo. However, I must see what authority there is. I think it must be taken as settled since *Dimech* v. *Corlett* (1) that if the charterparty provides a fixed number of demurrage days the ship must wait for those days if the charterer requires it and there is ground for believing that further cargo will be loaded. In this charterparty demurrage is provided for, but not for any fixed time. It seemed to me and I suggested during the argument that in such a case it is the duty of the ship to wait for a reasonable time. I am glad to find that Mr. Carver takes the same view. He says, art. 609, "In such cases," that is to say where the days are not fixed, "the true view seems to be that the charterers are entitled to keep the ship on demurrage for a reasonable time." For that proposition he cites *Lilly* v. *Stevenson* (2), where Lord Trayner says (3), "Where the days on demurrage are not limited by contract they will be limited by law to what is reasonable in the circumstances, as circumstances may happen to exist or to emerge." I shall adopt that view, and in my opinion, taking all the circumstances into consideration, including the fact that the ship was advertised to leave Las Palmas on January 7, the charterers were entitled to keep the ship at least till 5.30 P.M. on the 31st, by which time I find that 136 tons would have been

(1) (1858) 12 Moo. P. C. 199, at p. 231.

(2) (1895) 22 R. 278.

(3) Ibid. at p. 286.

loaded. It is probable that more would have arrived and would have been loaded, but the evidence was not sufficiently precise to enable me to be certain on this point. It is to be observed that I have decided this case on the footing that there was a demurrage clause. It is unnecessary to decide, and I do not decide, whether, if there had been no such clause, the ship could have left at the expiration of the two-and-a-half days which I have found to be the time allowed for loading. Inasmuch, however, as, in order to get the 136 tons loaded, the charterers would have had to pay one day's demurrage, I must deduct this. It was argued that I ought not to make this deduction, but I think I must. I have no right to put the charterers in a better position, or the shipowners in a worse position, than if the ship had waited. The plaintiffs must recover the 25*l.* 17*s.* 4*d.* from their seller if their contract with the seller made him responsible for the delay. I therefore give judgment for the plaintiffs on the claim for 28*l.* 10*s.* 8*d.*, being 54*l.* 8*s.* less 25*l.* 17*s.* 4*d.* I must also give judgment for the plaintiffs on the counter-claim because the ship left before she was entitled to leave. I think in any case I should have refused to give the defendants any damages on the counter-claim, because in my opinion, having regard to all the circumstances, their conduct in not waiting was quite unreasonable. I do not at all accept their version that any serious consequences would have arisen at the Canaries if the ship had been detained another twenty-four hours. They would have received their 25*l.* 17*s.* 4*d.* for demurrage, which in my opinion would have fully compensated them.

Judgment for plaintiffs on the claim and counter-claim.

Solicitors for plaintiffs: *Field, Roscoe & Co., for Batesons, Warr & Wimshurst, Liverpool.*

Solicitors for defendants: *Botterell & Roche*

J. F. C.

1910
May 27.

THE KING *v.* THE JUDGE OF THE COUNTY COURT OF SURREY AND ANOTHER.

County Court—Trial—Right to have Action tried with Jury—Amount claimed not exceeding 5l.—Enforcement of Right relating to Land—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 101—*County Court Rules*, 1903, *Order* XXII., *r.* 3.

The plaintiff, who was the owner of certain land, demised the exclusive right of sporting and shooting over the land for two years to a person who employed the defendant as his head gamekeeper. A fire having broken out in the heather on the land, the defendant, thinking that the means taken by the plaintiff's men would not be successful in extinguishing it, set fire to certain strips of heather on the land to leeward of the approaching conflagration in order that the fire might be checked when it reached the places where the strips of heather had already been burnt down by him. The plaintiff brought an action in the county court claiming 10*s.* damages for trespass and an injunction. The defendant contended that it was necessary for the preservation of his employer's sporting rights over the land to use the above means for extinguishing the fire, and he gave notice requiring the action to be tried with a jury:—

Held, that the action was brought to enforce a right relating to land and for the recovery of damages in respect thereof within the meaning of Order XXII., r. 3, of the County Court Rules, 1903, and that therefore the defendant was entitled to have the action tried with a jury.

RULE NISI calling upon the judge of the county court of Surrey holden at Aldershot and the plaintiff in the action of *Cope* v. *Sharpe* to shew cause why the judge should not try the said action with a jury upon the ground that the defendant was entitled to a jury as of right, and that the judge had wrongly declined to entertain the question of the defendant's right thereto on the ground that he had already refused to exercise his discretion to allow a jury.

The plaintiff was the owner of certain land in Hampshire. The defendant was head gamekeeper of a Mr. Chase, to whom the plaintiff had let the exclusive right of sporting and shooting on the land in question for two years from February 1, 1909. The tenancy agreement had not been signed, but for the purpose of this case the tenancy was treated as being under a verbal

agreement, the terms of which entitled the tenant and his keepers to be on the land for all purposes connected with the breeding, preservation, and shooting of the game. On April 21, 1909, a fire of considerable dimensions broke out in the heather on the land in question. Whilst persons in the employment of the plaintiff were engaged in endeavouring to put out the fire, the defendant came on to the land and, thinking that the means employed by the plaintiff's men would not be successful in putting out the fire, he proceeded to set fire to certain strips of heather on the land to the leeward of the approaching conflagration, in order that the fire might be checked when it reached the places where the strips of heather had already been burnt down by him.

The plaintiff brought this action in the county court of Hampshire holden at Basingstoke to recover 10*s.* damages for trespass committed by the defendant in setting fire to the strips of heather, and for an injunction.

The action was tried before the county court judge without a jury, and he held that the defendant had committed a trespass, and gave judgment for the plaintiff for 5*s.* damages and for an injunction to restrain the defendant from lighting fires on the plaintiff's land, and (except when carrying out the necessary duties for his employer in pursuance of the latter's sporting rights under his agreement with the plaintiff) from entering or trespassing on any land of the plaintiff. He did not, however, find as a fact whether the act of the defendant in setting fire to the strips of heather was or was not necessary for the protection of his employer's rights as tenant of the shooting.

Upon appeal, the Divisional Court held (1) that if a fire breaks out on land the tenant of the sporting rights is entitled to adopt such means on the land for extinguishing the fire as may, in the circumstances, be necessary for the preservation of his sporting rights; and as the county court judge had not addressed his mind to that question, they ordered a new trial, and directed that the trial should take place in the county court of Surrey holden at Aldershot.

The defendant applied to the judge of the county court of

(1) [1910] 1 K. B. 168.

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Surrey, under s. 101 of the County Courts Act, 1888 (1), to exercise his discretion by ordering the action to be tried with a jury, but the judge refused the application. The defendant thereupon gave notice to the registrar of the Court, under Order XXII., rr. 1 and 3, of the County Court Rules, 1903 (2), that he required a jury to be summoned to try the action. A jury was accordingly summoned and was present in Court when the action was called on for trial, but the plaintiff's counsel objected to the action being tried with a jury, inasmuch as the judge had already refused the defendant's application for a jury. The judge held that, though his attention had not been called upon the previous application to Order XXII., r. 3, he had no power to alter his order and to try the action with a jury unless the plaintiff consented, which he refused to do. He accordingly refused to try the action with a jury. The defendant thereupon obtained the above rule nisi.

Parfitt, K.C. (*C. L. Chute* with him), for the plaintiff in the action, shewed cause. It is admitted that the defendant has the same right as to the mode of trial as if there had been no previous trial of the action: *Ford* v. *Taylor*. (3) The defendant is not entitled as of right to have the action tried with a jury. The plaintiff is not seeking in the action to enforce any right relating to land, nor to recover any damages in respect of any such right,

(1) 51 & 52 Vict. c. 43, s. 101: "In all actions where the amount claimed shall exceed five pounds, it shall be lawful for the plaintiff or defendant to require a jury to be summoned to try the said action, unless the action is of the nature of the causes or matters assigned to the Chancery Division of the High Court of Justice; and in all actions where the amount claimed shall not exceed five pounds, it shall be lawful for the judge in his discretion, on the application of either of the parties, to order that such action be tried by a jury; and in every case such jury shall be summoned according to the provisions in this Act contained . . . ."

(2) County Court Rules, 1903, Order XXII., r. 1, provides that notice of demand for a jury shall be given in writing to the registrar.

Rule 3: "Interpleader matters and actions of replevin or ejectment or for the recovery of possession, or to enforce any right relating to land, or for the recovery of any damages in respect of any such right, may, at the instance of either party, be tried by a jury; and by order of the judge any other action or matter or any question of fact arising therein, which but for this rule could not be so tried, may be tried by a jury."

(3) (1877) 3 C. P. D. 21.

within the meaning of Order XXII., r. 3, of the County Court Rules, 1903. There is no question in this action as to the title to the heather, or to the land on which the heather grows; the land and the heather belong to the plaintiff, and the plaintiff's case is that the defendant committed a trespass in wrongfully setting fire to the heather. The defendant's right to be on the land is not questioned. It is an ordinary action of trespass. The words in Order XXII., r. 3, "to enforce any right relating to land or for the recovery of damages in respect of any such right," must be read as having a meaning somewhat analogous to the preceding words. This action does not come within the rule when viewed in that light. The proper test is to look at the form of the action, and it cannot be successfully maintained that an ordinary action of trespass to land comes within Order XXII., r. 3. The case comes within s. 101 of the County Courts Act, 1888, and not within the rule, and inasmuch as the damages claimed do not exceed 5*l.* the judge has a discretion whether the action shall be tried with a jury, and he has in his discretion refused to order a trial with a jury. If there is any inconsistency between s. 101 and Order XXII., r. 3, the section must prevail. Even if the claim for the injunction were the main claim, and if the amount of damages claimed exceeded 5*l.*, the action would belong to the class of actions assigned to the Chancery Division of the High Court, and under s. 101 the defendant has no right to a jury. The defendant is therefore not entitled to have the action tried with a jury.

St. Gerrans (*Nolan* with him), for the defendant, in support of the rule. The issue in this action is what are the respective rights of the plaintiff and of the tenant, to whom the plaintiff has demised the exclusive right of sporting and shooting over the land for two years, in regard to the land. The grant of a right to shoot over land and to take away the game shot is a grant of an interest in land within s. 4 of the Statute of Frauds: *Webber* v. *Lee*. (1) The tenant therefore acquired an interest in the land, and the question in the action is as to the respective rights of the plaintiff and the tenant of the sporting rights over the land. That was the view of the Divisional Court (2) when they

(1) (1882) 9 Q. B. D. 315. (2) [1910] 1 K. B. 168.

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ordered a new trial. In other words the question is how far have the rights of the plaintiff over the land been taken away or modified by the demise of the sporting rights. The action therefore seeks to enforce a right relating to land, or to recover damages in respect of such a right, within the meaning of Order XXII., r. 3, of the County Court Rules, 1903. That rule is consistent with s. 101 of the County Courts Act, 1888, because there must be many actions where damages are not an adequate remedy and are no test of the importance of the action, and therefore the rule was framed for the purpose of enlarging the scope of the section. Order XXII., r. 3, applies, and the defendant is entitled to a jury.

LORD ALVERSTONE C.J. This case has been already tried before a county court judge sitting without a jury, and he gave judgment for the plaintiff for 5*s.* damages and for an injunction to restrain the defendant from lighting fires on the plaintiff's land. Upon appeal the Divisional Court set aside that judgment and ordered a new trial. Either party has the same right, if any, to a trial by jury as if the action were now set down for trial for the first time. In these circumstances the defendant applied to the judge for an order that the action should be tried with a jury, this application being based upon the discretion which the judge has under s. 101 of the County Courts Act, 1888, to order that mode of trial, the amount of damages claimed not exceeding 5*l.* The judge refused the application. The defendant then gave notice, based upon Order XXII., rr. 1 and 3, of the County Court Rules, 1903, that he required a jury to be summoned to try the action, and that notice raises the question which we have to decide. A jury was summoned and was present in Court on the day when the action was fixed to come on for trial. The plaintiff, however, objected to the action being tried with a jury, upon the ground that the judge had already refused an application for a trial with a jury, and the judge held that he was bound by his previous order, and refused to try the action with a jury in the absence of the plaintiff's consent. The present rule was accordingly obtained.

The point which we have to decide is whether the defendant

has a right under Order xxii., r. 3, to have the action tried with a jury. There can be no doubt that, if the plaintiff were in the position of a landowner bringing an ordinary action of trespass against a trespasser upon his land, the case would not come within the rule, which provides that "interpleader matters and actions of replevin or ejectment, or for the recovery of possession, or to enforce any right relating to land, or for the recovery of any damages in respect of any such right, may, at the instance of either party, be tried by a jury."

The position of the parties here presents the case in quite a different aspect. Both the plaintiff and the tenant of the shooting rights have an interest in the land. The plaintiff, who is the owner of the land, has granted to a Mr. Chase the exclusive right of sporting and shooting over the land for two years. The tenant of the sporting rights clearly has certain rights in respect of the heather for the preservation of the game. A fire having broken out in the heather on the land, the defendant, who was Mr. Chase's head gamekeeper, set fire to other heather on the land in order to check the approaching conflagration, thinking that this would be a more successful way of arresting the progress of the fire than the means adopted by the plaintiff's men. That is an act which it is sought to justify upon the ground that the defendant had in the circumstances a right to do it, and that is the question which has been sent down to be tried. That raises the question as to the respective rights of both parties in the land. I desire to express no opinion whatever as to whether the defendant had any right to set fire to the heather. That question, as I have said, has to be tried. It seems to me that the plaintiff in this action is seeking to enforce a right relating to land and to recover damages for the alleged infringement of that right within the meaning of Order xxii., r. 3. He is alleging that the defendant acted in excess of any right which he had on the land, and that he, the plaintiff, had a right to have the heather on his land left untouched by the defendant in this way. The action therefore comes within the class of actions specified in Order xxii., r. 3, and either party has a right to have it tried with a jury. The rule must therefore be made absolute.

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CHANNELL J. I am of the same opinion. We have to interpret Order XXII., r. 3, and we must construe it so as, if possible, to make it consistent with the provisions of s. 101 of the County Courts Act, 1888. If there is any inconsistency between the two the Act must prevail. Sect. 101 provides that if the amount claimed exceeds 5*l.* either party shall have a right to have the action tried with a jury, unless the action is of the nature of the causes or matters assigned to the Chancery Division of the High Court of Justice; but if the amount claimed does not exceed 5*l.* it gives the judge a discretion as to whether the action shall be tried with a jury or not. The true meaning of that section is that, if the question is of sufficient importance as measured by the amount of damages, there is a right to a trial by jury, and that it is only in really small cases that there is no right to a jury. That, to my mind, is the true meaning of the Act. It is obvious, however, that there are some cases where the amount of damages claimed is no test whatever as to the importance of the action, and for that reason it was necessary to supplement the provisions of the Act by Order XXII., r. 3, the object of that rule being to deal with cases where the amount of the damages claimed is no test of the importance of the action. The rule includes "interpleader matters and actions of replevin or ejectment or for the recovery of possession," where the main object of the action is not the recovery of damages, and it then goes on, "or to enforce any right relating to land, or for the recovery of any damages in respect of any such right." These latter words refer to actions where a right relating to land comes in question, and includes cases where damages are claimed for the infringement of that right though the damages claimed do not exceed 5*l.* When read with s. 101 of the Act the rule in substance means that, notwithstanding that the damages claimed do not exceed 5*l.*, when the action is brought in respect of matters of more importance, by reason of their relating to land, than the amount of the damages claimed would indicate, either party is entitled to have the action tried with a jury. Applying that test to this case, it is clear that 10*s.*, the amount of the damages claimed, is no test of the importance of the action. The action is not brought merely to

recover 10*s.* damages. The real object is to test the right of the defendant to set fire to the heather. Does then this case come within the rule? It seems to me to be somewhat near the line. The action is not one of the special actions named in the rule, but it seems to me to be brought in respect of a right relating to land, and it is important to the parties independently of the amount of the damages claimed. The language of the rule covers this case, and in my opinion the rule is not inconsistent with the Act.

LORD COLERIDGE J. I am of the same opinion. The right which a shooting tenant, who is entitled to keep the game he shoots, has, is to enter upon the land for the purpose of exercising his sporting rights and to take away the game which he shoots. In other words, it is a profit à prendre, and therefore the shooting tenant has an interest in the land within s. 4 of the Statute of Frauds. That has been so decided in *Webber* v. *Lee*. (1) This case therefore seems to me to come within Order XXII., r. 3, inasmuch as the right which the defendant sets up here is a right relating to land. That is a claim of right which the plaintiff contests, and the plaintiff brings this action in consequence. The case therefore comes within the rule, and the defendant is entitled to have the action tried with a jury.

Rule absolute.

Solicitors shewing cause against the rule: *Johnson, Weatherall & Sturt, for Lamb, Brooks & Co., Basingstoke.*

Solicitors in support of the rule: *Walker & Rowe, for E. T. Close, Camberley.*

(1) 9 Q. B. D. 315.

W. F. B.

C. A.

1910

Feb. 15, 22; *April* 25.

[IN THE COURT OF APPEAL.]

THE KING *v.* SHANN AND OTHERS.

Licensing Acts—Renewal—"On" Licence—Ante-1869 Beer-house—Differentiation between redundant Houses belonging to different Owners — What Matters Compensation Authority may take into Consideration—Licensing Act, 1904 (4 *Edw.* 7, *c.* 23).

Where under the Licensing Act, 1904, the question of the renewal of two "on" licences of ante-1869 beer-houses belonging to different owners was referred to the compensation authority, and the compensation authority were satisfied that only one of them was required for the needs of the neighbourhood:—

Held by Farwell and Kennedy L.JJ. (Vaughan Williams L.J. dissenting), that for the purpose of differentiating between the two licensed houses and deciding which of the licences should be renewed the compensation authority were not entitled to take into consideration what other licences the owners of the respective licensed houses would be willing to surrender nor what contribution they would be willing to make to the compensation fund in consideration of the renewal of the licence in respect of which the application was made.

APPEAL from the decision of a Divisional Court discharging rules nisi for a mandamus to the justices for the county borough of Manchester to hear and determine according to law an application for the renewal of an "on" licence in respect of a beer-house known as the Church Inn, and for a certiorari to quash an order refusing the renewal of the said licence. The case is reported [1910] 1 K. B. 10.

The Church Inn, which was situate at 17, Russell Street, Crumpsall, in the city of Manchester, and was owned by Wilson's Brewery, Limited, had been licensed from a time prior to 1869 for the sale by retail of beer to be consumed on the premises. Next door, at No. 19, Russell Street, was another beer-house, known as the Egerton Inn and belonging to a Mr. Holt, which had been similarly licensed from before 1869.

At the general annual licensing meeting for the city of Manchester in the year 1908 objection was made to the renewal of the licence of each of these beer-houses on the ground that neither of the licences was required, but both licences were renewed, the justices suggesting that some arrangement should be made

between Wilson's Brewery and Mr. Holt whereby the owner of one of the houses should purchase the other and then surrender one of the licences and rebuild the other house. Negotiations were entered into for that purpose by the owners of the houses, but proved abortive. On or about February 4, 1909, notices were served on the respective tenants of the two houses that objections would be made at the general annual licensing meeting to the renewal of the licences on the ground that the licences were not required. At the general annual licensing meeting on February 18 the licensing justices heard applications for the renewal of the licences of both the houses, and also the objections thereto, and referred the question of their renewal together with their reports thereon to the compensation authority. Those reports stated, as regards the Church Inn, that there were two licensed houses within a radius of a hundred yards and three licensed houses within a radius of three hundred yards; that the vault, bar parlour, and out department were unsuitable, and that the sanitary accommodation was unsatisfactory; and, as regards the Egerton Inn, that the number of licensed houses within a radius of one hundred and three hundred yards were respectively the same as in the case of the Church Inn; that the tap-room, bar parlour, and lobby were unsuitable; and that the sanitary accommodation was unsatisfactory. On June 10 the question of the renewal of the two licences came on for hearing together before the compensation authority. The only evidence given before them in support of the objection to the renewal of the licence of the Church Inn was that of a police officer, who stated on oath that the facts contained in the two reports were correct. The compensation authority also examined the plans of the two houses as they then existed, which plans had been deposited with them. These plans shewed that the accommodation of the Egerton Inn was slightly the more convenient of the two. The owners of the Church Inn through their counsel stated that in the event of their licence being renewed they would rebuild their house in accordance with certain other plans, also deposited with the compensation authority, and would surrender the licences held by them in respect of two other licensed houses. Counsel for the owner of the Egerton

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Inn made a similar offer in the event of his licence being renewed. According to an affidavit filed on behalf of Wilson's Brewery, Limited, those offers were made in answer to a question by Sir Thomas Shann, the chairman of the compensation authority, as to what offers the owners of the two licensed houses were respectively prepared to make by way of a surrender of other licences or a money payment to the compensation fund in the event of the authority renewing the licence of one of the houses and allowing the owner to rebuild his premises. That affidavit went on to say that the chairman stated that the offers were insufficient, and that the authority wished to hear whether either owner would make an increased offer; that later on the same day the chairman requested each owner to enclose an increased offer in a sealed envelope and hand the same to the clerk, and said that such offers would be considered and a decision would be given the next morning as to which of the two licences they would renew; that on the next day (June 11), neither of the owners having increased his offer, the decision was further adjourned to the supplemental meeting on July 29, with liberty to the owners to communicate increased offers in the meantime. It was further stated in the affidavit that on June 16 the owners of the Church Inn received a letter stating that Mr. Holt had decided to increase his offer and would be willing to surrender three licensed houses, and that on July 28 the owners of the Church Inn wrote to Sir Thomas Shann a letter protesting against the owners of licensed houses being placed in competition with one another. On July 29 the supplemental meeting was held, when the chairman announced that the compensation authority refused to renew the licence of the Church Inn; the licence of the Egerton Inn was renewed unconditionally. In an affidavit made by Sir Thomas Shann in reply, the statement that the compensation authority had intimated that their decision would be dependent upon the amount of the respective applicants' offers of licences or money was denied. It was alleged in the affidavit that the compensation authority in arriving at their decision ignored the letters and offers of the applicants and decided the matter solely upon the merits as appearing from the facts stated in the licensing justices' reports and the deposited

plans of the existing premises. Rules nisi for a mandamus and certiorari having been obtained on behalf of Wilson's Brewery, Limited, the owners of the Church Inn, the Divisional Court (Lord Alverstone C.J., Darling and Bucknill JJ.) held that the compensation authority were entitled for the purpose of differentiating between the two houses to take into consideration the offers made by the respective owners, and discharged the rules. Wilson's Brewery, Limited, appealed.

Sir E. Carson, K.C., and *Jordan*, for the appellants. Upon the affidavits it is clear that Mr. Holt's letter offering to surrender the licences of three houses, and the appellants' letter of protest in which they declined to make any offer, came before the compensation authority. The course taken by that authority amounted to putting up to competition between rival owners of licensed premises the decision of what the order of the compensation authority should be upon the question which of the two licences should not be renewed. Neither the Licensing Act, 1904, nor the rules made under it give power to the compensation authority to take such a course as that taken in the present case upon a reference to them of the question whether a licence shall be renewed. Under s. 1, sub-s. 2, of the Act they are bound to consider the case of each licensed house upon its own merits. Possibly, in a case where the owner of a licensed house, the renewal of the licence of which had been referred to the compensation authority, had another licensed house, there might be no objection to his arranging with the authority to give up the licence of the latter house if the authority would renew the licence of the former; but, assuming that to be so, it is quite clear that, where two persons are applying for the renewal of the licences of their respective houses, it is ultra vires for the authority to make the question which licence shall be renewed, and which suppressed, the subject of an auction, as was in effect done in the present case. If the compensation authority think that there is a superfluity of licensed houses in the district, they may no doubt, where applications for the renewal of the licences of two houses belonging to different owners have been referred to them, in determining which of the two licences shall not be

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renewed, take into consideration the qualifications of one house as compared with those of the other with regard to the convenience and interests of the public. But there is nothing to empower them to entertain or consider offers made by the owners of the respective houses in competition with one another to surrender other licences, the renewal of which has not been referred to them, still less to entertain or consider offers to contribute sums of money to the compensation fund. Sect. 3 of the Licensing Act, 1904, provides for the levying of the charges from which that fund is constituted, and there is no machinery by means of which a sum of money can be contributed to that fund in the manner suggested. The making and entertaining of such an offer by implication imports that, in its absence, the decision would be unfavourable to the renewal of the licence; it is therefore really an offer to purchase the renewal of a licence which ex hypothesi ought not to be renewed. The decision in *Leeds Corporation* v. *Ryder* (1) is no authority for the course which the compensation authority took in the present case; the facts there were wholly different. There was no question there of competition between the respective owners of licensed houses, or of the reception of an offer from the owner of licensed premises such as was made by the owner of the Egerton Inn. Lord Loreburn, in saying that he saw no objection to arrangements being made between owners of public-houses and members of a licensing committee with a view to the suppression of licences under s. 1 of the Act, was not referring to any such proceeding as that in the present case; he merely meant that there was no objection to an arrangement by which the corporation, who were the owners of a number of licensed houses, agreed with the licensing committee that in the case of some of those houses the licences should not be renewed, and that in the case of other houses there should be a reference to the compensation authority with a view to the licences not being renewed and compensation being awarded. It was not there a question of competition between different owners of licensed premises as to which of two licences should be renewed, and which should be suppressed as redundant. The compensation authority has clearly no power

(1) [1907] A. C. 420.

under the Act to decide which of two licences shall not be renewed by reference to such offers as they allowed to be made by the rival owners in the present case; and having once allowed these offers to be made, their decision cannot stand: *Reg.* v. *Bowman* (1); *Rex* v. *Dodds.* (2) There having been no proper legal hearing on the merits, there should be a mandamus to hear and determine as well as a certiorari to bring up and quash the order of the compensation authority.

F. E. Smith, K.C., and *Overend Evans* (*J. Wylie* with them), for the respondents. Assuming that for the compensation authority to allow this offer to be made was an irregular proceeding, the evidence shews that the authority did not take it into consideration for the purposes of their decision and were not influenced by it in the conclusion at which they arrived. In such cases the question is whether there was a real likelihood of bias on the part of the justices: *Rex* v. *Sunderland Justices.* (3) There was no such likelihood of bias here. The compensation authority appear to have come to the conclusion in this case that one licensed house was required, but that two licensed houses were more than sufficient, for the wants of the neighbourhood, and that neither of the two houses was structurally altogether satisfactory; under those circumstances the question was which of the two was to retain its licence. The owners of both houses offered to rebuild, and produced plans of the proposed alterations, which were both satisfactory, although they shew that the frontage of the Egerton Inn was superior to that of the Church Inn. The justices, having in this difficult situation to decide between the two houses, no doubt inquired what offers the owners of the houses respectively were prepared to make with regard to the surrender of other licences or the payment of a sum to the compensation fund; subsequently, however, they appear to have become doubtful whether the course which they were pursuing was legal or well advised as a matter of policy, and after a discussion on the subject they decided that they would not allow themselves to be guided by the offers made. There was before the compensation authority, apart from any offer made, ground for differentiating

(1) [1898] 1 Q. B. 663. (2) [1905] 2 K. B. 40.
(3) [1901] 2 K. B. 357.

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between the two houses, and the statement that they were not influenced by the offer made by the owners of the Egerton Inn is confirmed by the fact that they did not eventually make it a term of renewing the licence of that house that the owner should surrender any other licences. The fair inference is that they honestly considered the case apart from the offer which had been made and finally decided in favour of the Egerton Inn.

But the more generally important question is whether, assuming that the case must be dealt with on the footing that the compensation authority might have been influenced by the offer, the course which they pursued was lawful. No offer was made to contribute any sum to the compensation fund, and that element may be dismissed from consideration. The question divides itself into two: first, whether, putting aside the element of competition between the owners of two licensed houses, and taking a case where the question whether a licence is to be renewed, or to be suppressed as redundant, relates to one licensed house only, there is any legal objection to an arrangement between the compensation authority and the owner of the house in question that, if they will renew the licence of that house, he will surrender the licence or licences of another licensed house or other licensed houses in the district. *Leeds Corporation* v. *Ryder* (1) is a distinct authority that in such a case the justices may make such an arrangement with the owner of licensed premises. *Rex* v. *Dodds* (2) was a case in which the justices endeavoured to make the renewal of an existing on licence conditional on the applicant giving an undertaking as to the conduct and management of the business in respect of matters not covered by the grounds for refusing a renewal specified in s. 1 of the Licensing Act, 1904; this it is clear they had no power to do. That case is wholly different from the present. It was a common practice before the Act of 1904, where an application was made for a licence for premises which had been rebuilt, for the licensing justices to say that, as the drink area in the house was enlarged, the applicant, as a condition of the licence being granted, must surrender the licence of some other house. There is nothing in the Act of 1904 to forbid such a bargain. The second head of

(1) [1907] A. C. 420. (2) [1905] 2 K. B. 40.

this question is whether the element of competition between the owners of two licensed houses makes any difference with regard to the legality of such a bargain; it is contended that it does not.

[FARWELL L.J. One difficulty is that as regards the houses of which the owners offered to surrender the licences there had been no reference and no report.]

There is no provision in the Act of 1904 that any licence need be before the compensation authority other than that in respect of which they have to decide whether to renew or refuse the renewal. All statutory requirements are complied with when the reports as to the particular houses are before the compensation authority. The effect of *Leeds Corporation* v. *Ryder* (1) is that, in cases where the compensation authority are dealing with the application of one single owner, they can agree to grant the renewal applied for if the applicant will agree to give up another licence or other licences in its place; and there can be no reason why in a case of competition the authority should not apply the same pressure to two owners that they can to one; the element of competition cannot make that wrong which would have been right in the case of a single individual applicant.

[KENNEDY L.J. In *Leeds Corporation* v. *Ryder* (1) there was no pressure or compulsion; it was the case of a voluntary offer to surrender licences, which makes all the difference.]

In that case the eleven houses dealt with were not before the compensation authority on their merits, and what was done with them was in substance the same as that which was done in the present case by the compensation authority. Any difference between the bargain in that case and the present one is a difference of form only. It is admitted that the compensation authority could not have demanded a money payment, but the arrangement made was unobjectionable.

Sir Edward Carson, K.C., in reply, cited the following additional authorities:—*Dartford Brewery Co.* v. *County of London Quarter Sessions* (2); *Rex* v. *Southampton Licensing Justices* (3); *Royal Aquarium, &c. Society* v. *Parkinson.* (4)

Cur. adv. vult.

(1) [1907] A. C. 420.
(2) [1906] 1 K. B. 695.
(3) [1906] 1 K. B. 446.
(4) [1892] 1 Q. B. 431.

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April 25. VAUGHAN WILLIAMS L.J. I had written a judgment in this case, but having had the advantage of reading the judgments prepared by my learned brethren, I find that they take a different view from myself as to the conclusions in fact at which we ought to arrive. The conclusions in fact seem to me difficult to arrive at with certainty, but as my colleagues think that their view of the facts can be arrived at without any great doubt, I do not propose to read the judgment I had written; for I think that I shall best perform my duty by stating shortly what it was that, when I was considering the facts of the case, made me hesitate as to what my conclusion ought to be. I may say at once that the conclusion at which I have arrived on the facts is the same as that arrived at by the learned judges in the Divisional Court.

The facts are clear up to a certain point, and I cannot do better than read the concise statement of the facts not in dispute given in the judgment of Lord Alverstone C.J. (1) I read from the beginning of the judgment, because it states conveniently the form of the proceedings as well as the facts which are treated as not being in dispute. The Lord Chief Justice says: "In this case rules nisi for certiorari and mandamus were obtained by Sir Edward Carson, calling upon the compensation authority of the city of Manchester to shew cause why a certain order made by them should not be quashed and a mandamus issued to them to hear and determine certain applications with regard to certain licences. The grounds were that the justices, in making the order objected to, improperly received evidence which was not admissible and neglected to hear and determine the applications in accordance with law." The evidence in question, to which I shall presently call attention more precisely, was given in the affidavit of Sir Thomas Shann, the chairman of the compensation authority, and was in substance an explanation of that which influenced the minds of that body. There was a doubt as to the admissibility of that evidence. The Lord Chief Justice proceeds: "Two beer-houses, both in existence in the year 1869, and named respectively the Church Inn and the Egerton Inn, were situated side by side in Russell Street, Higher Crumpsall, Manchester.

(1) [1910] 1 K. B. 10, at p. 14.

Applications were made at the annual licensing meeting for the renewal of the licences. They were both renewed at the meeting held in the year 1908, but intimation was given that when any future application was made the question of renewal would be considered. Objection had been raised that neither of the houses was required"—which was the sole objection—"and upon granting the renewal the justices suggested that some arrangement should be made for the surrender of one of the licences. In the month of February, 1909, notices of objection were served upon the licensee of each of the houses, objecting to their renewal on the ground that they were not required. These applications were heard on February 18, 1909, and were referred to the compensation authority, and on June 10, 1909, the question of the renewal of the licences was considered by the compensation authority. The report to the compensation authority in respect of the Church Inn was put in evidence before us. It was stated in the affidavits filed on behalf of the licensees that no question was raised before the compensation authority as to there being too many licensed houses for the requirements of the neighbourhood in the district. This statement was contradicted by the affidavits filed on behalf of the justices, and we are satisfied, after carefully considering those affidavits, that the question of the redundancy or excessive number of public-houses was distinctly raised"—I may here say that, having read the affidavits of Mr. Wilson and Sir Thomas Shann, I agree with that conclusion—"and that the Court clearly intimated that in their opinion the renewal of the licence of one of the two houses would have to be refused." Again I agree. "It was in evidence that the accommodation and arrangements at both of the houses, the Church Inn and the Egerton Inn, were defective, and plans were produced for rebuilding both. Upon the occasion of the further hearing of the applications for renewal questions were raised as to what, if any, other licences the owners of the two inns were prepared to surrender or what payment they were prepared to make to the compensation fund in the event of the licences being renewed. Offers were made by both parties, and the cases were adjourned in order that the parties might consider whether either of the parties should make

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an increased offer, and on June 11 the case was again adjourned to July 29 to see whether any further offer would be made by either party. Certain letters were written to the chairman, Sir Thomas Shann, but he stated in his affidavit that it was unanimously decided that the contents of the letters should be ignored and the cases decided upon the merits." Although the Lord Chief Justice felt considerable doubt as to the admissibility of the evidence as to what influenced the minds of the justices who acted as the compensation authority, he accepts Sir Thomas Shann's affidavit as a correct statement of the facts.

Under those circumstances several suggestions are made, most of them very clearly, in the affidavit of Mr. Wilson; they come to this: that, reading his affidavit in connection with the correspondence which took place, what happened was really a putting up to auction of the decision of the compensation authority—in other words, that they were prepared to refuse the licence of the man who made the lower bid and to leave the other licence untouched; the result of this would be that the latter licence would continue to run for at least twelve months until the next year's brewster sessions, the event not having occurred which, according to the form of the provisional licence, would bring that licence to an end. In my opinion it is not a right conclusion to draw from the facts that there was a putting up to auction by the compensation authority of anything which was to be purchased at a price. The questions asked by the compensation authority were two—first, what, if any, licences each of these licensees would be prepared to surrender in the district where these two houses were situate, and, secondly, what contribution, if any, or what money payment, if any, the parties were respectively disposed to make to the compensation fund. I take it that these are questions which in no way indicate what the decision of the justices was going to depend on, or that it was going to depend on which was the bigger offer; they merely shew that the compensation authority were anxious to be in a position, when they came to consider finally what licences should be refused, to satisfy themselves whether the applicants respectively would be willing, if the licence was renewed, to fall in with the practice of the Manchester justices, and whether the building schemes of

each house were each of them fit to meet the increase of custom likely to come to the surviving house. It is probably true that, if you wished to differentiate two public-houses, the fact that a building scheme in respect of them had been laid before the licensing justices and the compensation authority would not be evidence proper for the purpose. The cases of these two houses were taken at the same time with the consent and, I think, at the request of the licensees, and this course is expressly authorized by r. 17 of the Licensing Rules. My own view is that information of this sort, directed to the question whether each of these licensees, if his licence were not refused and his building scheme were allowed to come into operation, would be willing to fall in with the practice of the Manchester licensing justices, ought not to be treated as indicating an intention to put the licences up to auction. So far, I have nothing to add to the findings of fact in the Divisional Court.

But the judgment of the Lord Chief Justice goes on to point out a further objection, which is of a more serious character. It says: "The main ground urged by Sir Edward Carson in support of the rules was that the renewing justices had not, nor had the compensation authority, any right to consider any question of offers made by the licensees respectively as to what the owners were prepared to do in the way of surrender of other licences or contribution to the compensation fund if their licences were renewed, and he contended that the consideration and reception of such offers vitiated the subsequent proceedings and established his contention that the renewing magistrates acted beyond their jurisdiction, even though they had disregarded the offers in coming to their decision." The contention, as I understand it, is this, that the only body which has to deal with the question of the alteration or rebuilding of these public-houses was the licensing justices, and that at no time and for no reason had the compensation authority a right to get information as to what these people would be willing to offer either by way of surrender of licences or of contribution to the compensation fund. I think that probably that view is right, if it means that the compensation authority had no right to make willingness to conform to their conditions a condition necessary to avoid the refusal of the

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licence. I do not think the compensation authority had any right to do that; in fact, I doubt whether even the licensing justices had any such right, at all events after the matter had been referred by them to the compensation authority. Upon this point I may refer to *Bushell* v. *Hammond* (1), the head-note to which case is as follows: "By s. 11, sub-s. 4, of the Licensing Act, 1902, licensing justices, on renewing a licence, may by order direct that, within a time fixed by the order, such alterations as they think reasonably necessary to secure the proper conduct of the business shall be made in 'that part of the premises where intoxicating liquor is sold or consumed':—*Held*, that under this sub-section licensing justices had jurisdiction, upon granting an application for renewal, to make an order that the back entrance to the licensed premises should be closed and kept locked, and that the passage leading from the back entrance to the bars where intoxicating liquor was sold and consumed should be closed, their power including the right to decide what alteration in the means of access was reasonably necessary to the proper conduct of the business." In his judgment Collins M.R. says (2): "Although the phraseology used is not very exact, one fixed purpose runs through these sub-sections—namely, the exercise by licensing justices of a control over the structure of licensed premises; and this control may be exercised in two ways—first, by the giving or withholding of their consent to structural alterations during the currency of a licence; and, secondly, by an order to carry out structural alterations made upon an application for renewal of a licence, and in a sense, though not as a matter of law, as a condition of the renewal of the licence." That passage, in my opinion, exactly expresses the right view of this power of control by licensing justices; that is, that it would not be right to make their wishes or their control of structural alterations or rebuilding a condition of the renewal of a licence, but that nevertheless they have the power to make an order to carry out their wishes as to such control, which power may involve either forfeiture of the licence or the punishment of the licensee by fine for disobedience to that order; in a sense, as was said by Collins M.R., that would be a condition of the licence.

(1) [1904] 2 K. B. 563. (2) [1904] 2 K. B. at p. 568.

In the present case what the magistrates did was to get information from these people who brought the building scheme before them. There were two sets of plans before the compensation authority, one shewing the existing buildings, and it was upon points arising in those plans which were spoken to by the police constable that the compensation authority differentiated the two houses; it was upon the evidence of the plans of the existing houses that they acted. As to the other plans, the justices were only getting information as to a fact which might be reasonably taken into consideration by them in the performance of their duty. It was with respect to that duty that Lord Alverstone C.J. said (1): "It seems to us, however, that, having regard to the provisions of the Act of 1904, the compensation authority were entitled to consider in deciding the question of renewal what, if any, licences the respective owners would be prepared to surrender, or what contribution would be made to the fund." I will only add here that, whatever was the ground upon which the compensation authority thought they would best perform their duty by getting this information, the only information they in fact got was that both applicants were at first willing to surrender two licences, and that ultimately the appellants, in a letter which seems to have first given expression to the idea that there was anything of the nature of a sale by auction, declined to comply with either of the conditions, upon which the owner of the Egerton Inn continued the offer that both had originally made, and in fact increased the number of licences he was willing to surrender.

Reviewing all the circumstances, I think this is a very difficult case, for undoubtedly the mode in which the compensation authority dealt with the matter might well give rise to a suggestion that they were dealing with it after the fashion of an auction; but on the whole, while I cannot differ from the conclusions of my brethren in the Court below, I feel the full force of the objection that the compensation authority ought not to have dealt with this matter of the compliance with the practice of the Manchester justices. On the whole, however, I accept the affidavit of Sir Thomas Shann and the other magistrates as

(1) [1910] 1 K. B. at p. 16.

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being true and am of opinion that the mistake, if any, was not such as to vitiate the proceedings, and I do not see my way to interfere with the decision appealed against.

FARWELL L.J. read the following judgment:—The question on this appeal relates to the exercise by the compensation committee under the Licensing Act, 1904, of the jurisdiction given to them by that Act to refuse the renewal of existing ante-1869 on licences. No question of a new licence arises in this case; that question depends on different sections of the Act. The appellants are the owners of the Church Inn, Crumpsall, Manchester, which has from a date prior to 1869 been licensed to sell by retail beer to be consumed on the premises. Another inn, the Egerton, belonging to different owners, is situate next door to the Church Inn. In 1908 objections were taken before the licensing justices that neither of these licensed houses was required. Both licences were, however, renewed, the justices suggesting that the owners should arrange that one should buy the other out, and that at the next annual licensing meeting one licence should be given up and the other house should be rebuilt and enlarged. As at present advised, this suggestion appears to me to have been a sensible one, and properly made by the justices within the case of *Leeds Corporation* v. *Ryder*. (1) The owners, however, failed to come to terms, and in 1909 the justices declined to renew either licence, but reported both to the compensation committee. Their report on the Church Inn was that it was not required, and it is agreed that the report on the Egerton Inn was in similar terms. In June, 1909, the two cases were taken together by the compensation committee. As the two houses stood side by side, and the question whether one of them was or was not required necessarily affected the same question respecting the other, I think that this was a sensible and proper procedure, and authorized by r. 17 of the Licensing Rules, 1904. But when the cases were called on, no evidence was given that there were more licensed houses than the neighbourhood required, or differentiating one house from the other. The only evidence was the justices' reports, the statements in which were verified

(1) [1907] A. C. 420.

by a policeman. Thereupon the compensation committee proceeded to invite the owners of the two houses, in order to save their licences, to make offers by way of surrender of other licensed houses belonging to them, or of a money payment. Each owner offered to give up two licensed houses; no inquiry was made as to their position or the requirements of the neighbourhood in which they were situated, and the appellants had not in fact any houses to be surrendered, but proposed to purchase such as would be required to satisfy the demands of the committee. These offers, however, were considered inadequate, and the hearing was adjourned for further and better offers to be made. The owners of the Egerton Inn made a further offer of a third house, but the appellants refused to make any further offer; and at a subsequent meeting the committee renewed the licence of the Egerton Inn, but refused that of the Church Inn. The chairman of the committee has filed evidence to shew that the committee were not influenced by the offers. I agree with the Lord Chief Justice that it is impossible to act on such evidence, and that the real question is whether the course of procedure adopted by the committee is justifiable or not. I am of opinion that it is not; and I venture with great respect to think that the Lord Chief Justice in relying on the *Leeds Case* (1) has overlooked the fact that in that case the action of the compensation committee did not come in question at all, but the licensing justices, for the purpose of their report to the committee, made an arrangement with the owners of thirty-six licensed houses in the same district that some should be given up, some should be renewed, and some should be reported for compensation to the committee, but with a restriction on the owner that he should not ask for more than 10,000*l*; the amount that he might obtain would be for the committee; all that the justices could do was to put a limit on the amount that he could claim. When once the questions of interest in the justices and of bona fides were determined in favour of the justices, the arrangement was not only unobjectionable, but (as the Lord Chancellor said) in accordance with the true intent of the Act. Moreover, there is no real analogy between a consultation between the owner of a number of licensed houses and

(1) [1907] A. C. 420.

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the justices with a view to an amicable arrangement as to which of those houses are redundant and should be given up, and a demand by the compensation committee for the surrender of unspecified licensed premises as the price for renewal of the licence of an existing house. It is, in my opinion, clear that the licensing justices and the compensation committee are two distinct and independent bodies, whether the latter be quarter sessions, as provided by s. 1, sub-s. 1, of the Licensing Act, 1904, or the majority of the whole body of justices as provided by s. 8, sub-s. 2, of that Act as amended by the Licensing Act, 1906. Now s. 1 of the Act of 1904 takes away the power of the justices to refuse renewal of an on licence and vests it in the committee but provides that this power to refuse shall only be exercised on a report by the justices and on payment of compensation under the Act, and in order to make this report the justices are to consider the matter, and if they come to the conclusion that the question of renewal requires consideration, they are to refer the matter with their report to the committee. Then the committee must consider all the reports so made and may hear the persons interested and the justices, and, after having done so, may refuse renewal subject to compensation. There is no power given to the committee to grant the licence at all; this is done by the justices provisionally in the case where they refer the case to the committee, but by them and not by the committee in any case: see rr. 41, &c., and forms 2 and 15 and 16. The justices collect the materials and enter into such arrangements (if any) as may obviate the necessity of a contest, and the committee have the duty of considering the reports and such other evidence as is mentioned in s. 1, and of deciding, upon these materials, whether the licence ought or ought not to be renewed by the justices. I can find nothing in the Act that justifies the committee in offering to sell the renewal, either for a money payment which would go to the rates as if made under s. 4, sub-s. 4, or to the compensation fund, as the committee might choose to direct, or for the surrender of other licensed premises. The illegality of a money payment is, in my opinion, decided by *Reg.* v. *Bowman* (1), and is the more marked in this case because the Act expressly

(1) [1898] 1 Q. B. 663, at p. 666.

authorizes money payments in the case of new licences and does not do so in the case of these renewals of old licences.

The surrender of other licences is in some ways even more objectionable. The Act does not treat licensed houses as capita lupina, to be destroyed whenever occasion offers. Some such houses are treated as requisite for the use and benefit of the public, because those only that are not so requisite are to be got rid of. It is said that the question of redundancy was raised before the committee, but no one suggests that there was any report from the justices or any evidence thereon. The committee's action disregards all public requirements and proceeds on the footing that as many houses as possible, whether required or not, shall be destroyed. In this case they do not know what the houses offered for sacrifice are or where they are situated; they have never been considered or reported on by the justices, and the power to refuse renewal is confined to the houses on which the justices have reported; but they claim powers to compel, not directly, indeed, but most effectually, the destruction of houses on which the justices have not reported at all, and that, too, without that compensation which the Act requires to be given. It is not lawful for any committee or person to whom powers are given by the Legislature for a specific and limited purpose so to use such powers as to compel obedience to its wishes in respect of matters outside those limits. Not only are public requirements disregarded by the course of conduct pursued by the committee, but great injustice would be inflicted on poor men; the rich owners of many tied houses might be glad to give up several of them in order to get rid of a single free house, the sole property of some poor man who had no other house and no money to offer as ransom to the committee. The Act of 1904 does not recognize the theory of ransom in respect of existing licences, but proceeds on the principle of reducing the number of licences when the evidence shews that there are more than the neighbourhood requires and of compensating such as are destroyed because of redundancy. The committee have acted, in my opinion, on a wrong principle, and this appeal should be allowed.

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KENNEDY L.J. read the following judgment:—The material facts of this case are these. The renewal of the licence to the appellants' beer-house, which had been licensed as such from a time prior to the year 1869 and was called the Church Inn, and the renewal of the licence to another similar house owned by one Edward Holt, which immediately adjoined the Church Inn and was called the Egerton Inn, were both objected to at the general annual licensing meeting of the licensing justices for the city of Manchester in February, 1909, on the ground that such licences were not required. At the adjourned licensing meeting held on the 18th of the same month the two cases were heard together, and the justices decided to refer the question of the renewal of the licence in each case to the compensation authority (which consists under the Licensing Acts of 1904 and 1906 of the whole body of the justices for the city), with reports of the licensing justices thereon under the provisions of the Licensing Act, 1904, s. 1, sub-s. 2, and r. 41 of the Licensing Rules, 1904. In each case there were some structural faults in the buildings, but in neither case did such structural faults constitute a ground upon which the licensing justices could have refused, or did refuse, a renewal of the licence: see the Licensing Act, 1904, s. 1, sub-s. 1, and s. 9, sub-s. 3. The reference to the compensation authority was based solely upon the objection in each case that the inn was not required to supply the wants of the district. The reports in each case, setting forth the position and condition of the two adjacent inns, were in evidence. On June 10 and 11 the two cases were taken together before the compensation authority. The only evidence before the compensation authority consisted of the contents of the reports, the statements in which were vouched by the oath of a police officer. In the previous year, 1908, when these same two cases had come before the licensing justices, the bench had suggested that one or other of the owners of the respective inns should buy out the other and, giving up one inn, improve the other by a better and more commodious building. No arrangement, however, had been come to; but each owner had prepared a building scheme, and when the cases came before the compensation authority in June, 1909, these building plans were produced to the compensation authority.

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I may remark in passing that, whilst under the Licensing Act, 1902, s. 11, sub-s. 2, no alteration in licensed premises of a kind which gives increased facilities for drinking, or has certain other specified effects, can legally be made without the consent of the licensing justices, who may, before giving their consent, require a deposit of plans, neither the licensing justices nor the compensation authority can legally annex a condition as to structural alterations to the renewal of an existing on licence. Under s. 11 of the Licensing Act, 1902—see *Bushell* v. *Hammond* (1) ; *Smith* v. *Portsmouth Justices* (2)—the licensing justices may, subject to appeal to quarter sessions, by order direct that such structural alterations as they may think reasonably necessary to secure the proper conduct of the business shall be made in the part of the premises where intoxicating liquor is sold or consumed; and non-compliance with such an order is punishable by fine on summary conviction. But such an order of the licensing justices cannot be made, as a matter of law, a condition of the renewal of the existing licence: see per Collins M.R. in *Bushell* v. *Hammond* (3), and per Lord Alverstone C.J. in *Rex* v. *Bath* (*Recorder of*). (4) And the compensation authority, created by the Licensing Act, 1904, has no power or authority whatever to make such an order at all. "That Court was, as appears from the rules, to have the power either to continue the licence, or to cancel it subject to the payment of compensation as provided by the Act. They appear to have no further powers": per Mathew L.J. in *Rex* v. *Dodds*. (5) The general practice of the licensing justices in the city of Manchester, as stated in paragraph 12 of Mr. Wilson's affidavit of August 16, 1909, in regard to the allowance of structural alterations, is a matter with which the compensation authority, in regard to the renewal of licences referred to them, appears to me to have no concern.

What this compensation authority, consisting of Sir Thomas Thornhill Shann, chairman, and certain other city justices who with him formed the compensation authority, did, apart from all matters as to which there is controversy in the affidavits before

(1) [1904] 2 K. B. 563.
(2) [1906] 2 K. B. 229.
(3) [1904] 2 K. B. at p. 568.
(4) [1904] 2 K. B. 570, at p. 576.
(5) [1905] 2 K. B. 40, at p. 54.

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us, was to ask the representatives of the parties what offers the respective owners were prepared to make, either by way of surrendering other licences or by way of money contribution to the compensation fund, in the event of the compensation authority renewing the licence of one of the two inns and allowing its owner to rebuild his premises. Each of the respective owners then offered to give up two licences. It did not appear in evidence whether the appellants then possessed other licences in the district, or, if the compensation authority accepted their offer, meant to purchase in order to support their application before the compensation authority. This took place on June 10. At the further hearing on June 11 the chairman suggested that the respective owners might make an increase on these offers up to July 29, the date fixed for a supplemental or, as Sir Thomas Shann in his affidavit describes it, adjourned meeting of the compensation authority. According to paragraph 15 of the affidavit of Mr. H. M. Wilson, filed on behalf of the appellants, which is not, so far as I can see, traversed in the affidavits filed on behalf of the respondents, the appellants' representative there and then objected that the decision of the compensation authority ought not to be affected by the amount of offers to be made by the parties concerned. A few days later the owner of the Egerton Inn by letter informed the appellants, the owners of the Church Inn, that he intended to increase the offer he had already made to the compensation authority. In reply the appellants wrote to the owner of the Egerton Inn saying that they should not make any offer, and that in their opinion it was not right that owners of licensed property should be subjected to a competition of this sort. On July 28, the day before that appointed for the supplemental meeting of the compensation authority, the appellants wrote a letter to the chairman in which they plainly stated their objection to the procedure.

On July 29 the adjourned or supplementary meeting of the compensation authority took place. The legal representatives of the owners of the Church Inn and the Egerton Inn respectively renewed their applications. The justices had before them no other evidence than that which I have already mentioned, and they retired to consider the cases in private. The chairman then

produced and, as I understand his affidavit, for the first time opened and read the letter of the owner of the Egerton Inn increasing his offer and the letter of remonstrance from the owner of the Church Inn. It appears that it thereupon occurred to the minds of the justices, or of some of them, that the propriety of the course which so far had been pursued by them in regard to these two cases was doubtful, for the chairman states in his affidavit that "a vote was forthwith taken as to the desirability of considering the contents of these letters and discussing the new plans submitted by the licensees; and it was unanimously decided that they should be ignored." Subsequently, "after a careful and lengthy discussion," a vote was taken on the question which licence should be refused subject to compensation, and the result was unfavourable to the Church Inn. Only one further episode remains to be told. For some purpose which does not, I think, appear, there was a further meeting of the compensation authority on August 26 following. All, or all but one, of the justices present on July 29 were assembled together; and the chairman put to them collectively the question what influence the reading of the two letters had had on their minds in regard to their decision on July 29 to refuse the renewal of the licence of the Church Inn, and they all said that the cases were decided on their merits.

Now, in my view, it ought to be assumed, and, for myself, I unreservedly accept the view, that Sir Thomas Shann and his brother justices honestly believed on July 29 that they were deciding according to the merits, and that on August 26 they honestly asserted their belief that they had so decided according to the merits. But at the same time I concur with Lord Alverstone C.J., when, in delivering the judgment of the Divisional Court, he stated that, if the Court thought that it was improper for the compensation authority to ascertain what licences the respective owners were prepared to surrender in consideration of the renewal, the Court would agree with the contention of Sir Edward Carson on behalf of the present appellants that the reception and consideration of the offers of the licensees as to the surrender of the licences or contribution to the compensation fund, if their licences were

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renewed, would vitiate the subsequent proceedings and establish the contention that the renewing magistrates acted beyond their jurisdiction, even though they disregarded the offers in coming to the decision. "It was stated by Sir Thomas Shann and all the other magistrates who took part in the proceedings that the decisions to renew the licence of the Egerton Inn and to decline to renew the licence of the Church Inn were considered and decided upon their merits, but, if we had thought that the evidence was inadmissible, we should not have been prepared to accept the view that the subsequent decision to disregard such offers and to decide the case upon the merits would get over the difficulty." I agree with the Lord Chief Justice in this view of the law, and in my view it is fatal to the respondents' case. The Lord Chief Justice went on to hold, however, that the compensation authority in deciding the question of renewal were entitled to consider what (if any) licences the respective owners would be prepared to surrender, or what contribution they would make to the compensation fund. From this view I respectfully dissent. I cannot find any justification for the action of these justices either in the provisions of the Act of 1904, or in general principles of justice, or in the authority of the *Leeds Case* (1), to which the Lord Chief Justice proceeded to refer in his judgment.

The functions of the compensation authority under the Act of 1904 are, I think, clearly apparent. They have to consider in the first instance the question of renewal in the case of any licence in respect of which the licensing justices are of opinion that the renewal requires consideration on grounds other than those on which the renewal of the licence can be refused by them, and have referred the case to the compensation authority with their report thereon. Having heard the case, the compensation authority may decide either to renew or to refuse the renewal, subject to compensation, which the same authority has then to assess and apportion between the persons interested. Speaking generally, one may say that the ground of reference to the compensation authority is the superfluity of public-houses considered in relation to the wants of the district, and, according to Sir Thomas Shann's affidavit, that was the ground in this case.

(1) [1907] A. C. 420.

"I, as chairman, intimated clearly in open Court that there was a redundancy of licences in this district and that one of the two in question was sufficient for the needs of the district." Where such a state of things exists, and two or more licences are referred to the compensation authority, it is the duty of that authority, if the suppression of more than one is not required, to differentiate between the licences referred. But it is well settled that this differentiation must be upon evidence and that the report of the licensing justices is not in itself sufficient: *Dartford Brewery Co.* v. *County of London Quarter Sessions* (1); *Rex* v. *South Shields Justices.* (2) In the present case, so far as appears in the evidence, only the two licences in question were referred by the licensing justices, and it was reasonable enough that the two cases should be considered together, as they were in fact considered by the compensation authority, without objection on the part of the persons interested in them. But there was no evidence whereby to differentiate the two houses such as, if it had been acted upon in fact, I should have expected to find in Sir Thomas Shann's affidavit (unless—and I can find no suggestion of this—it is afforded by a comparison of their respective structural defects), and the respondents thereupon took the course which, although, no doubt, it was taken in perfectly good faith, appears to me to be wholly unjustifiable. "What offers," they asked, "will you the owners make to obtain a renewal, either by way of a contribution to the compensation fund or by way of surrender of other licences?" Each party on June 10 offered to surrender two licences. In fact, as I have said, it is not proved that the appellants at the time had any to surrender; I think it was admitted they had none. Whether the owner of the Egerton Inn, when he made the same offer, had in fact any to surrender, I do not know; anyhow, it does not appear that any investigation was made as to the locality of the houses to which the licences under offer attached. They might be in a part of the district where, in the public interest, no diminution of licences was required, or even desirable. The alternative suggestion, of a competition as to the amount of money which

(1) [1906] 1 K. B. 695.
(2) K. B. D., May 16, 1906, cited in Paterson's Licensing Acts, 20th ed., p. 670.

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either of the applicants would contribute to the compensation fund, appears to me to be at least as objectionable. It is in its nature, according to my view, as objectionable as the condition of a payment of 1000*l.* to the justices for a public fund was held to be in *Reg.* v. *Bowman.* (1) The language used by Wills J. in his judgment in that case seems to me very apposite. "The condition of the payment of 1000*l.* was wholly unjustifiable. If authority were needed, it is enough to refer to the case which was cited of *Rex* v. *Athay.* (2) The justices had no more right to require the payment of money for public purposes than to require that it should be paid into their own pockets. If the attachment of such a condition were allowed to pass without objection, there would soon grow up a system of putting licences up to auction—a system which would be eminently mischievous and would open the door to the gravest abuses. No doubt the justices were acting in perfect bona fides and in the interests of the public. But their conduct was none the less illegal."

What was done in the present case up to July 29 was, practically, indistinguishable from proceedings by auction. It finds no countenance in the provisions of the statute relating to the duties and powers of the compensation authority. Its possible injustice as between the owners of public-houses referred to the compensation authority on the question of renewal is obvious. Suppose that A., the owner of one of the licensed houses so referred, is the owner and occupier of his house, living by his trade in that house and owning no other, and B., the owner of the other house so referred, is a wealthy brewery company owning a number of tied houses in the district. It may well be worth while to B. either to sacrifice one or more other licences, or to make a liberal offer of contribution to the compensation fund, in order to get rid of A.'s competing house; whilst A. (I will suppose) has no other houses with licences to surrender and cannot afford to bid against his rival in the competition for renewal. It appears to me that the course taken, doubtless (as I have said) in good faith, by the justices sitting as the compensation authority is from every point of view indefensible; and, as

(1) [1898] 1 Q. B. 663. (2) (1758) 2 Burr. 653.

I have already said, I concur with the Divisional Court in holding that the vice (if vice there be) of the proceeding is in no way cured by the fact that on July 29 they resolved to disregard, and conscientiously believe that they did in fact disregard, the considerations which their actions up to that point had brought into existence.

I think that it appears from their judgment, pronounced by the Lord Chief Justice, that the members of the Divisional Court in coming to their conclusion were mainly influenced by a view which I must say, with due respect, appears to me to be an erroneous view of the applicability to this case of the judgment of the House of Lords in the *Leeds Case*. (1) That case, in my opinion, deals with different facts and forms no authority for the contention which the respondents are here setting up. The question there arose in regard to the action of the justices at the licensing sessions and not in regard to the action of a compensation authority. The material facts are stated concisely in the judgment of Lord Loreburn L.C.: "The justices of a licensing district granted provisional licences to certain nominees of the Leeds Corporation who did not carry on, and did not intend to carry on, the business of licensed victuallers, and were mere caretakers, and referred the matter to quarter sessions under s. 1, sub-s. 2, of the Licensing Act, 1904. My Lords, I will not enter upon the circumstances, but this is a step, and a very sensible step, in a proceeding under which the Leeds Corporation, who had bought these licensed premises, wished to have them suppressed upon the terms of receiving compensation, The only purpose was to keep the licences so that compensation should be paid for them, and the respondents object because they say that no compensation ought to be paid at all." In other words, what was unsuccessfully impeached by the respondents in that case was the carrying out by the justices at licensing sessions of an arrangement, to which some of these licensing justices were parties, made with a willing owner, that certain licences not required for the wants of the district which he possessed should, subject to compensation, not be renewed. It was objected by the respondents in that case, first, that the justices

(1) [1907] A. C. 420.

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had no power to refer the licences, because the renewal would be void; secondly, that some of the licensing justices were biassed, because they had taken part in promoting the arrangement; and, thirdly, that no one except the holder of a licence can apply for a renewal, and in this case the previous holder had gone and there had been no transfer. The House of Lords decided that none of these objections could be maintained. I can myself see no relevancy in that decision to the wholly different facts of the present case; and when Lord Loreburn L.C. said, at p. 424, in regard to the objection that some of the justices who constituted the licensing sessions had taken part in the arrangement with the willing owner for the non-renewal of some of his licences in the district, "I see no objection to arrangements being made between owners of public-houses and members of a licensing committee with a view to the suppression of licences under s. 1 of the Act," I can see in this pronouncement no colour of justification for a compensation authority, to whom the consideration of the renewal, in view of the wants of the district, of two licences has been referred by the licensing justices, after announcing that, on account of the redundancy of public-houses in the neighbourhood, one or other of the two licences will not be renewed, to suggest, and to receive, as a matter which will or may influence their decision, offers on the part of the competing licence-holders of what each, if his licence should be renewed, would be willing to pay to the compensation fund, or of what licences elsewhere he would be prepared to make surrender, in case of such renewal.

In my opinion this appeal should be allowed, and the rules for certiorari and mandamus made absolute.

Appeal allowed.

Solicitors for appellants: *Chester, Broome & Griffithes, for Foyster, Waddington & Foyster, Manchester.*

Solicitors for respondents: *Crowders, Vizard & Co., for Hockin, Beckton & Hockin, Manchester.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1910
April 20;
May 10.

KEATES *v.* LEWIS MERTHYR CONSOLIDATED COLLIERIES, LIMITED.

Master and Servant—Dispute between Employer and Workman—Subsisting Claims—Jurisdiction of Court of Summary Jurisdiction to adjust and set off—Set-off of Employer's Claim for Damages against Workman's Wages—Employers and Workmen Act, 1875 (38 & 39 *Vict. c.* 90), *s.* 3, *sub-s.* 1; *s.* 4.

By s. 3, sub-s. 1, of the Employers and Workmen Act, 1875, in any proceeding before a county court in relation to any dispute between an employer and a workman arising out of or incidental to their relation as such, the Court may adjust and set off all such claims on the part either of the employer or of the workman, arising out of or incidental to the relation between them, as the Court may find to be subsisting. By s. 4 a similar jurisdiction (up to a limited amount) is conferred upon Courts of summary jurisdiction.

An employer preferred a summons against a workman in a Court of summary jurisdiction, claiming (1.) damages for breach of contract by reason of the workman having wrongfully absented himself from his work, and (2.) that the wages earned by and due to the workman should be ascertained, and that the respective claims for damages and wages should be adjusted and set off by the Court. The workman made no claim for his wages in the Court of summary jurisdiction and contended that the Court had no jurisdiction to set off the damages against a claim for wages which had not in fact been made by him.

Held by Vaughan Williams L.J. and Farwell L.J. (Fletcher Moulton L.J. dissenting), that the jurisdiction of the Court under ss. 3 and 4 of the Act extended to the adjustment of all subsisting claims between the parties, and that as the workman's claim for wages, although not put forward by the workman himself, had been brought to the knowledge of the Court by the employer, the Court had jurisdiction to set off that claim against the employer's claim for damages.

Decision of the Divisional Court, [1910] 1 K. B. 386, affirmed.

Appeal from the decision of a Divisional Court upon a case stated by the stipendiary magistrate for the petty sessional division of Pontypridd, reported [1910] 1 K. B. 386.

At a Court of summary jurisdiction sitting at Porth a summons was preferred by the Lewis Merthyr Consolidated Collieries, Limited (the respondents), against Henry Keates (the appellant) under the Employers and Workmen Act, 1875, claiming damages for the appellant's breach of contract, and

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further claiming that the wages earned by and due to the appellant from the respondents be ascertained, and that the respective claims for damages and wages be adjusted and set off by the Court.

The following were the particulars of the respondents' claim:—

"The plaintiffs claim against the defendant the sum of 5*s.* 11*d.* for damages for breach of contract, the defendant having wrongfully absented himself from the service of the plaintiffs at their Bertie pit on the 30th day of April, 1909.

"The plaintiffs further claim that the wages earned by and due to the defendant from the plaintiffs be ascertained, and that the said respective claims for damages and wages be adjusted and set off by the Court."

The claim for damages for breach of contract arose from the fact that the appellant, together with the rest of the underground workmen working at the respondents' colliery, absented himself from work without leave, whereby the working of the colliery on April 30, 1909, was stopped for the day. The summons was issued on May 18, 1909, and the case was heard on August 19, 1909, and the magistrate found that there had been a breach of contract by the appellant and awarded the respondents 5*s.* 9*d.* damages in respect thereof and 5*s.* 6*d.* costs. The solicitor appearing for the respondents requested, in accordance with the particulars of claim, that the wages earned by and due to the appellant from the respondents should be ascertained, and that the respective claims for damages and wages should be adjusted and set off by the Court. He also contended that the respondents were entitled to have this adjustment and set-off made by reason of s. 3, sub-s. 1, and s. 4 of the Employers and Workmen Act, 1875. (1) The solicitor for the

(1) By the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 3, "In any proceeding before a county court in relation to any dispute between an employer and a workman arising out of or incidental to their relation as such (which dispute is hereinafter referred to as a dispute under this Act) the Court may, in addition to any jurisdiction it might have exercised if this Act had not passed, exercise all or any of the following powers, that is to say,

"(1.) It may adjust and set off the one against the other all such claims on the part either of the employer or of the workman, arising out of or incidental

appellant contended that there was no claim on the part of the appellant before the Court; that no claim had in fact been made by the appellant at any time before the proceedings were taken before the magistrate or before August 19, 1909; that the appellant had no claim within the meaning of the Employers and Workmen Act, 1875, and the rules under it; and that the magistrate had no jurisdiction to comply with the request made by the respondents' solicitor. The magistrate held that he had jurisdiction.

Evidence was called before the magistrate, and in the result he found as a fact that, after making certain authorized deductions, a sum of money amounting to 1*l.* 15*s.* 8*d.* had (after the institution of the proceedings before him) been earned by and was due to the appellant under his contract, and that that sum was payable by the respondents to him upon the following Saturday, August 21. It was the practice at the respondents' colliery to pay the workmen at the end of each fortnight, payment being made on alternate Saturdays for the work done by the workmen during the fortnight ending a week previously, that is to say, on the Saturday next preceding the pay day. On the afternoon immediately preceding pay day there would be given to each workman a ticket shewing the amount of and the manner in

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to the relation between them, as the Court may find to be subsisting, whether such claims are liquidated or unliquidated, and are for wages, damages, or otherwise; . . . ."

By s. 4, "A dispute under this Act between an employer and a workman may be heard and determined by a Court of summary jurisdiction, and such Court, for the purposes of this Act, shall be deemed to be a Court of civil jurisdiction, and in a proceeding in relation to any such dispute the Court may order payment of any sum which it may find to be due as wages, or damages, or otherwise, and may exercise all or any of the powers by this Act conferred on a county court: Provided that in any proceeding in relation to any such dispute the Court of summary jurisdiction—

"(1.) Shall not exercise any jurisdiction where the amount claimed exceeds 10*l.*; and

"(2.) Shall not make an order for the payment of any sum exceeding 10*l.*, exclusive of the costs incurred in the case; and

"(3.) Shall not require security to an amount exceeding 10*l.* from any defendant or his surety or sureties."

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which his wages for the fortnight ending the previous Saturday were made up, and on presenting his ticket on the following day at the company's pay office the workman would be paid the amount of wages shewn thereon. A pay ticket was produced and put in by the respondents shewing the manner in which the sum of 1*l.* 15*s.* 8*d.* was made up, but the ticket had not been delivered to the appellant, nor would it have been delivered to him in the ordinary course of events until Friday afternoon then next, August 20, nor did the appellant know the exact sum which would be payable to him by the respondents on Saturday, August 21, when in the ordinary course he would have been paid the sum due. In accordance with the usual practice, no request or application for payment of the sum in question had been made by the appellant before August 19. The magistrate accepted the contention of the respondents that their indebtedness in the sum of 1*l.* 15*s.* 8*d.* to the appellant constituted a claim of the appellant within the meaning of s. 3, sub-s. 1, of the Employers and Workmen Act, 1875, and held that he had no discretion in the matter, but was bound to set off the costs and damages he had awarded to the respondents against the sum of 1*l.* 15*s.* 8*d.*; he made the following order: "It is this day adjudged that the plaintiff company recover against the defendant the sum of 5*s.* 9*d.* for damages and the sum of 5*s.* 6*d.* for their costs, and this Court having found that the plaintiff company are indebted to the defendant in the sum of 1*l.* 15*s.* 8*d.* for balance of wages, it is ordered that the said sums of 5*s.* 9*d.* and 5*s.* 6*d.*, making together the sum of 11*s.* 3*d.*, be set off against the said sum of 1*l.* 15*s.* 8*d.*, and that the balance remaining after such set-off, namely, the sum of 1*l.* 4*s.* 5*d.*, be paid by the plaintiff company to the defendant."

The questions for the opinion of the Court were: (1.) Had the magistrate jurisdiction to make the adjustment and set-off in the above circumstances? (2.) Was the sum of 1*l.* 15*s.* 8*d.* a claim by the appellant, or, alternatively, was it a claim within the meaning of s. 3, sub-s. 1, of the Employers and Workmen Act, 1875, and the rules made thereunder? (3.) If he had jurisdiction, was he bound to set off the damages and costs against the sum of 1*l.* 15*s.* 8*d.*, or had he an absolute discretion in the matter?

The Divisional Court (Lord Alverstone C.J. and Ridley J., Darling J. dissenting) held that the magistrate had jurisdiction to make the adjustment and set-off. The workman appealed.

Bailhache, *K.C.*, and *John Sankey*, *K.C.* (*Clive Lawrence* with them), for the appellant. The magistrate had no jurisdiction to order the appellant's wages, for which no claim had been made by him, to be set off against the damages awarded by him to the respondents in respect of the appellant's breach of contract. The power of set-off given in s. 3, sub-s. 1, and s. 4 of the Employers and Workmen Act, 1875, is only exercisable where there are separate substantive claims made by the employer and workman respectively, for damages in the one case and for wages in the other ; the claim must be made " on the part of " the employer or the workman, as the case may be, and a claim for, or right to, wages which is merely brought to the notice of the Court by the employer cannot be a claim " on the part of " the workman for those wages. The power to set off wages in such a case cannot be exercised at the instance of the employer ; it is a weapon of defence, not of offence. It is quite clear that the employer himself cannot deduct from a workman's wages money which a Court of summary jurisdiction has ordered a workman to pay as damages for breaches of his contract to work : *Williams* v. *North's Navigation Collieries* (1) ; such a deduction or set-off can only be made by a Court having jurisdiction under the Act of 1875. That Act is the sole inroad upon the principle of the inviolability of a workman's right to be paid his full wages in money, and such an Act should be strictly construed. The claim which is to be set off must be made by the other side, that is, by the person in the position of defendant in the proceedings ; and the right to set off damages and wages is dependent upon there being before the tribunal two conflicting decisions, one in favour of each party. The so-called further claim of the employers is not a claim at all. It is highly doubtful whether the workman ever had an enforceable claim for wages, for the pay ticket was the sole basis of such a claim, and that was not made out and handed to him until the day after the magistrate's

(1) [1906] A. C. 136.

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decision ; moreover, the wages, even if they had been ascertained at that date, were not payable until two days afterwards. [Rule 3 of the Employers and Workmen Rules, 1886, was also referred to.]

Bankes, K.C., and *Lush, K.C.* (*Trevor Lewis* with them), for the respondents. The Act of 1875 was passed with the intention of providing machinery for the summary and complete settlement of disputes between employers and workmen, and was largely in the interest of workmen. Sect. 3 contemplates that the workman rather than the employer will be in the position of defendant in proceedings under the Act, and it gives the party initiating the proceedings power to bring all subsisting disputes to the notice of the Court.

[FLETCHER MOULTON L.J. Do you contend that a power " to adjust and set off " refers to money not yet payable ?]

Yes ; that is what the Act intended in the workman's interest. The material time to look at in construing s. 3 is the time when the parties are before the county court or the Court of summary jurisdiction, as the case may be, and the inquiry will be as to what claims are subsisting at that time. The expression " subsisting claims " is not to be construed in the narrow sense of claims which have been put forward ; it means claims which in fact exist. The Court clearly has jurisdiction to deal with such claims, for sub-s. 1 gives power to adjust and set off such claims as the Court may " find to be subsisting " ; it may therefore inquire and find out what are the subsisting claims on the part of the one or the other, and is not confined to dealing with claims actually brought. The words " on the part of " really help the respondents ; they point to a condition of things existing at the time, and not to claims which are being actively formulated. Conflicting claims are not necessarily cross demands, and a claim is none the less a claim because it is not put forward. [They also referred to *In re Land Credit Co. of Ireland, Markwell's Case.* (1)]

John Sankey, K.C., in reply. The object of the Act of 1875 may have been to make a complete adjudication of subsisting

(1) (1872) 21 W. R. 135.

disputes between employers and workmen, but only if both parties wanted it.

Cur. adv. vult.

May 10. VAUGHAN WILLIAMS L.J. read the following judgment:—This case turns on the construction of an Act of Parliament the object of which it is not easy to define. It would not be quite accurate to say that the Act of 1875 gives increased powers to county courts and to Courts of summary jurisdiction in respect of disputes between employers and workmen. The Act of 1875 enlarges the powers of county courts in respect of disputes between employers and workmen, but gives to Courts of summary jurisdiction new civil jurisdiction which such Courts had not before. The jurisdiction given to the county court by s. 3 is a new jurisdiction in kind. It gives powers which cannot be exercised by the High Court—e.g., as to rescission of contracts on terms and taking security. Then by s. 4 the powers conferred by the Act on the county court may be exercised by a Court of summary jurisdiction. The Act is obviously open to serious objections if it is intended to give a cheap and ready mode of settling disputes between employers and workmen; for the provision of two tribunals which can give effect to the special new powers created by the Act is that one part of disputes existing at one and the same time between the master and a particular workman may be determined in the county court, and another part of the disputes existing at the same time determined in the Court of summary jurisdiction. This was decided in the case of *Hindley* v. *Haslam* (1), a case in which a master, having to complain of negligence of a spinner who had damaged materials on which he was working, dismissed the spinner and refused to pay wages in lieu of notice, and was sued in the county court by the spinner for the wages in lieu of notice. The master at the hearing put forward no counter-claim or set-off, but gave evidence of the spinner's negligence. A verdict of 3*l.* 10*s.* was given in the spinner's favour. This gives rise to two observations—first, that the negligence of the man may not have been sufficient to justify dismissal, but sufficient to justify a claim for

(1) (1878) 3 Q. B. D. 481.

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damages for negligence; secondly, that the trial in the county court seems to have been a trial by jury. Cockburn C.J. says: "Our judgment must be for the respondents. The matter in question before the justices was one which the county court judge was not called upon to decide." Lush J. says: "I am of the same opinion. I cannot see that the respondents were bound to bring this matter before the county court judge by way of counter-claim." Mellor J. says: "I am bound to say that I think it most inconvenient that a controversy involving so small a sum should be divided and go before two different tribunals, but I think the justices had jurisdiction to make this order."

It would obviously conduce to a much cheaper and more complete settlement of existing disputes between a master and his workman if the judge of the county court or the magistrate in the Court of summary jurisdiction disposed of the whole of the disputes and subsisting claims while the parties, the master and the workman, were before him. It may be difficult, where the case is being tried by jury, for the county court judge to exercise all the new powers given by s. 3, sub-ss. 1, 2, and 3, even in a case where there are claims put forward in the nature of set-off and counter-claim. But the question we have to decide is in the main whether the magistrate, when a dispute between master and workman has come before him and the plaintiff has put forward a claim, can deal with claims of the defendant which are brought to his notice, but which the defendant has not put forward. This is the question which I propose now to discuss. The case of *Hindley* v. *Haslam* (1) only decides that, in a case where there was no claim by way of set-off or counter-claim put forward and only a verdict of the jury on the claim for wages without the judge exercising the special powers given by s. 3 of the Act, there is nothing to prevent the defendant afterwards taking proceedings in the Court of summary jurisdiction to recover damages for the loss he had sustained by the negligence of the spinner which damaged the material.

In my judgment it would be much more consonant with the plain purpose of the Act if the county court judge and the magistrate respectively had power to make an end of the dispute

(1) 3 Q. B. D. 481.

by disposing of all subsisting claims whether put forward or not. In the case of *Clemson* v. *Hubbard* (1) Cleasby B. says: "What does dispute mean? The respondent says as there must be two minds ad idem to contract, so there must be two minds ad idem to assent to dispute. It seems next to an absurdity to make it essential that both parties should assent to giving jurisdiction to a tribunal. The 1st sub-section of s. 3 shews that the power to act depends upon the existing state of things—on the facts—and not on the state of mind of the parties"; and Grove J. says: "I am of the same opinion. It would be a strange result of the Act if we were required to hold that the justices were to have jurisdiction if the workman had said when he went away from the service that he disputed the right to a week's notice, but that they had none when he only shewed it by his acts. Mr. Buszard's argument would make the jurisdiction like a submission to arbitration and the justices the arbitrators, whose power to act depends upon the consent of the parties." This case was one in which the master claimed 5*l.* damages from the workman for absenting himself from work without notice and not resuming work or offering any explanation. "At the hearing of the complaint an objection was taken that there was no dispute arising out of or incidental to the relation of employer and workman inasmuch as the respondent had not until that time had any distinct intimation that the appellant claimed from him a week's notice, and therefore had had no opportunity of disputing the claim." The justices allowed the objection and refused to hear the claim. I think that the decision of the appellate Divisional Court was right. I think that the words of s. 4, "and in a proceeding in relation to any such dispute the Court may order payment of any sum which it may find to be due as wages or damages or otherwise, and may exercise all or any of the powers by this Act conferred on a county court," go to shew that the magistrate may exercise powers not the subject of a claim put forward. Moreover the words of sub-s. 1 of s. 3 are strong to shew that the Act gives jurisdiction if the Court finds claims to be subsisting whether or not the claim has been put forward

(1) (1876) 1 Ex. D. 179; 45 L. J. (M.C.) 69. The citations are from the *Law Journal* report.

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at or before the hearing. The words are "It may adjust and set off the one against the other all such claims on the part either of the employer or of the workman, arising out of or incidental to the relation between them, as the Court may find to be subsisting, whether such claims are liquidated or unliquidated, and are for wages, damages, or otherwise." I cannot think that this construction is excluded by the words "on the part of." It is not easy to suggest different words which would express claims which can be taken into consideration as a credit to the master or the workman, as the case may be, when the judge is adjusting the rights of the two parties to a dispute. I think that in making this adjustment the magistrate or judge of the county court is only doing that which he must do before he can properly exercise the powers of sub-s. 2 of s. 3, which I think are powers which he can exercise although neither party puts forward a claim that he should do so. "Claims" in this section does not mean claims put forward to the exclusion of claims not put forward, but claims whether put forward or not. It is not denied that this is a sense in which the word "claim" is used, and many examples of user in such a sense were given in the argument before us. I think that the whole scheme of the Act shews that this is the proper construction of the word "claim" in the present Act.

I further think that the magistrate was right in taking into consideration claims down to the time of hearing, and that he was right in including debita in præsenti solvenda in futuro—i.e., wages earned before the hearing but payable two days after the hearing. I do not think that the exercise of the jurisdiction and the powers given by the Act of 1875 to county courts and Courts of summary jurisdiction will interfere with actions in the High Court. The High Court has not jurisdiction to exercise the powers given by the Act of 1875, ss. 3 and 4. I do not give any weight to the argument based on r. 3, which deals with the notice that a defendant must give if he intends to rely on any set-off or counter-claim, because I think that this does not prevent the magistrate or judge himself requiring such information as will enable him to adjust subsisting claims and puts him in a position to exercise, if he thinks right, the power of sub-s. 2

of s. 3 and make an end of the dispute. He is not bound to take this course. He has a discretion. I think this appeal should be dismissed with costs, and think so the more because I think that the workman took the course he did of not putting forward the claim for the express purpose of preventing the dispute between himself and his master being disposed of effectively according to the respective rights of the parties.

FLETCHER MOULTON L.J. read the following judgment:—This case raises a point of great general importance, namely, the interpretation of the principal enacting section of the Employers and Workmen Act, 1875. By that Act increased powers were given alike to county courts and to Courts of summary jurisdiction in respect of disputes between employers and workmen, the latter term having so wide an interpretation that it practically includes all persons engaged in manual labour (either under contracts of service or under contracts personally to execute any work or labour), with the exception of domestic or menial servants. There can, I think, be no doubt that the Act was in some respects a reaction against the policy of preventing wages being arrested before they reached the workman in virtue of cross-claims on the part of the employer, illustrations of which are to be found in the Truck Acts and in the Wages Attachment Abolition Act, 1870. The Act of 1875 was evidently intended to facilitate the set-off of valid claims by the one party against the other so that the balance only should be paid by the party liable. But, although it is clear that this was the aim and the tendency of the legislation, the extent to which it carried this policy is to be judged only from the language of the Act itself, and this is the fundamental question which has to be decided in the present case.

The new powers are given to county courts in clause 3 and to Courts of summary jurisdiction in clause 4 of the Act. The powers so given do not differ in their extent, but it is not unworthy of remark that whereas by clause 9 the Lord Chancellor is empowered to make rules for carrying into effect the jurisdiction by the Act given to a Court of summary jurisdiction, there is no corresponding provision with regard to his making

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rules for county courts in respect of like matters. A fair conclusion is that it was contemplated that the general rules of such Courts would be adequate to deal with the new jurisdiction. The powers given by the Act to the Court are, so far as is material, as follows: "It may adjust and set off the one against the other all such claims on the part either of the employer or of the workman, arising out of or incidental to the relation between them, as the Court may find to be subsisting, whether such claims are liquidated or unliquidated, and are for wages, damages, or otherwise"; and the question here is what is the meaning of the word "claims" in such a context?

Prima facie, where the word "claims" appears in connection with the jurisdiction of a Court, one would give to it the meaning of a claim made in that Court, and the complete phrase "claims on the part either of the employer or of the workman" would seem irresistibly to point to claims made in that Court by the employer against the workman or by the workman against the employer, so that the jurisdiction would extend only to claims put forward before the Court by each party on his own behalf against the other party. But it must be admitted that some doubt is thrown upon this, the natural interpretation of the language used, by the presence of the words "as the Court may find to be subsisting." These words undoubtedly create a difficulty, as they would seem to point to a judicial act of the Court in discovering or recognizing the existence of claims. Accordingly it has been argued before us that the jurisdiction of the Court is to ascertain whether or not there are existing disputes or allegations or existing liabilities on the one side or the other, and this whether or not they have been made the subject of an appeal to the jurisdiction of the Court in that or any other proceeding, and whether the person in whose favour the supposed liability exists is or is not desirous of the assistance of the Court with respect to it. Such a wide and vague jurisdiction would certainly be contrary to legislative precedent, and one would expect that, if it was intended to create it, the conditions of the exercise of the new powers would be clearly ascertained, either by the language of the enacting section or by rules to be framed thereunder. In the absence of any such attempt on the part of the Legislature

to regulate either the procedure or the extent of the jurisdiction otherwise than by the words above quoted I have come to the conclusion that we ought not to give to the words of the section the almost limitless extension claimed by the respondents, but that we ought to hold that the jurisdiction is confined to the adjustment or set-off of such claims as are properly brought before the Court by the party who seeks its assistance in enforcing them. I will now state the considerations which have influenced me in coming to such a conclusion.

In the first place, the clear and definite words "claims on the part either of the employer or of the workman" weigh greatly with me in favour of the more limited construction. It seems to me almost impossible to speak of anything as a "claim on the part of" a person unless it is a claim which he has put forward. It would be straining language unjustifiably to give to these words the meaning of "a possible liability towards such party." It is true that the word "claim" standing alone is sometimes used in the sense of a liability which will in all probability be put forward or asserted in the future, or even of a liability existing on the ground of duty apart from any question of its being asserted, as, for instance, when we talk of the claims of children on their parents. But I cannot think of any use of the full words "claims on the part of" with any other signification than that of a claim actually asserted by the party, and, as we are here dealing with tribunals which exist for the purpose of hearing and deciding claims brought before them by the parties seeking their aid, I think that the difficulty in interpreting these words in any other than their natural sense is insuperable.

Considering next the consequences in practice of the interpretation suggested on behalf of the respondents, it will be seen on examination of the Act that there is no limitation to the amount of the claims cognizable under the Act in a county court. The limitations of amount to be found in s. 4 relate to Courts of summary jurisdiction only. If then the county court has jurisdiction to take cognizance of any existing claims, whether brought before it by the parties or not, it follows that even claims by a workman against his master forming the subject-matter of an action in the High Court—say for damages for

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negligence—could be thus compulsorily decided by the judge of the county court, although the cause of action was for so large a sum that the workman would otherwise be entitled to have it tried in the superior Court, and to have the advantage of a jury, and although the county court could have no power to deal with the costs already incurred. Nor would the strange consequences of the interpretation stop here. According to the respondents, it is only necessary that claims should exist at the time the hearing takes place to entitle the county court compulsorily to decide them. If, therefore, the master or the workman has brought a dispute into the county court, he has the right to annex thereto any disputes subsequently arising prior to the hearing of the plaint, and this without giving any notice to the other party that he proposes to bring the matters before the Court at the hearing; for certainly neither in the Act nor in the rules of the county court are there any provisions for giving notice under the Act in respect of any other dispute than that which is the subject of the plaint.

An attempt was made to answer these considerations by the suggestion that the jurisdiction is only discretionary and that it must be supposed that the county court will not exercise it except in proper cases. But to my mind this is not a satisfactory answer when we are considering the nature of the jurisdiction. The consequences I have above referred to flow so immediately and so directly from the jurisdiction, if it be such as is contended for by the respondents, that one cannot believe that the Legislature would not have had them in its contemplation. It has conferred the jurisdiction without qualification or restriction, and if we accept the interpretation put upon the section by the respondents we must take it that the Legislature intended the county court to exercise it generally in cases covered by it, and intended therefore that these strange consequences should follow from it. All these consequences flow from giving to the words of the section a meaning which implies that the Court can compulsorily decide questions of liability when they are not brought before it by a party asking its aid to enforce that liability. If, on the other hand, we give to the words a meaning consistent with the universal practice in English Courts of law, namely

that the Courts are there to enforce the rights of parties asking their aid, these difficulties will disappear. In other words, we have only to give to the words "claims on the part either of the employer or of the workman" their ordinary and natural meaning, and the scope of the clause will be restricted to claims properly brought before the Court by the party asserting the claim. The object of the section then becomes twofold. In the first place it extends the jurisdiction of the county court to claims between workmen and masters of any amount, and in the second place it gives the complete power of adjusting and setting off claims and cross-claims so that the balance only has to be paid by the one party to the other. In the state of legislation as it existed before the passing of the Act this absolute power of set-off cannot be said to have existed, and therefore it is not necessary to adopt the interpretation contended for by the respondents in order that the Act may accomplish a useful purpose.

Appeal has been made to the fact that in the next sub-section a wide and anomalous jurisdiction is given to the Court to rescind the contract of employment on terms. We are not concerned with the interpretation of this sub-section, for it has admittedly no application to the present case. But it is argued that, because wide and ill-defined powers of an unusual kind are thereby given to the Court in such cases, we ought to interpret sub-s. 1 in a wider sense than we should otherwise do. I cannot assent to so dangerous a canon of interpretation. Sub-s. 1 is not in my opinion affected by the presence of the wholly distinct provisions of sub-s. 2, and I do not feel drawn towards limiting the freedom of choice of Courts which the workman as well as the master possesses with regard to disputes between them, and which was expressly recognized by the decision of the Court of Queen's Bench in *Hindley* v. *Haslam*. (1) I may add that the only other reported case which I have found relating to the matter, namely, *Clemson* v. *Hubbard* (2), establishes only the proposition (which I should have taken to be self-evident) that a complaint by a master against a workman for absenting himself without leave was a dispute within the meaning of the section.

(1) 3 Q. B. D. 481. (2) 1 Ex. D. 179.

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I have dealt with the question of the true interpretation of the Act before applying it to the special circumstances of the case before us partly because it seems to me important that this question of general interest should receive judicial decision and partly because it was the point mainly argued before us. But when we have regard to the special circumstances of this case it seems to me clear that under no interpretation of the Act is the decision of the learned stipendiary sustainable. The original plaint was brought by the master against the workman, and the particulars of the plaint are as follows: "The plaintiffs claim against the defendant the sum of 5*s.* 11*d.* for damages for breach of contract, the defendant having wrongfully absented himself from the service of the plaintiffs at their Bertie pit on the 30th day of April, 1909. The plaintiffs further claim that the wages earned by and due to the defendant from the plaintiffs be ascertained, and that the said respective claims for damages and wages be adjusted and set off by the Court." The second paragraph of these particulars appears to me to be in no sense a claim. It is merely a request that at the hearing the Court will exercise a certain jurisdiction, not in respect of the matter of the claim, but in respect of matters wholly future. The so-called claim of which the master at the hearing asked the Court to take cognizance under the second paragraph was one for wages in respect of the fortnight expiring August 14, 1909, whereas the date of the summons was May 18, 1909. The language of the section puts beyond doubt that the claims to which it refers are money claims, and not mere requests to exercise a special jurisdiction; and to my mind by no reasonable interpretation of the word "claim" can such a paragraph be a claim within the section. This paragraph may therefore be struck out of the summons as neither helping nor hurting the right of the master to the set-off in question.

It remains therefore to consider whether, even in the wider sense of the word "claims" contended for by the respondents, the wages were a "claim" at the date of the hearing. Apart from the fact that they related to work which had not been done at the date of the summons, I am of opinion that they did not constitute a claim,

because there was no sum presently payable in respect of them. It is clear from the facts stated in the special case that under the terms of employment the wages in question were not payable until Saturday, August 21. The pay ticket setting forth the particulars of these wages had not been delivered and was not yet due. The workman could not therefore have successfully put forward on his own behalf any claim for the wages, and it seems to me an absurdity to suggest that the master could put forward a "claim on behalf of the workman" against his will for a sum which the workman was himself not entitled to claim at the time. This appears to me to be in itself conclusive in favour of the appellant in this appeal. But I am also of opinion that the Act does not mean that anybody can put forward a claim other than the person claiming, and therefore that the master would not have been able to drag in the question of wages if the workman did not put it forward, even if the wages had been actually due and payable at the moment. For these reasons I am of opinion that this appeal ought to succeed.

FARWELL L.J. In the year 1875, when the Employers and Workmen Act was passed, a master who had recovered judgment for damages against a workman for breach of contract to work was prohibited by the Truck Act, 1831, from deducting such damages from the workman's wages—*Williams* v. *North's Navigation Collieries* (1)—and was prohibited by the Wages Attachment Abolition Act, 1870, from obtaining from any Court of record or inferior Court an order for the attachment of such workman's wages. The only remedy, therefore, that the master possessed (unless the workman sued him for subsequent wages, in which case he could plead the judgment debt by way of set-off) was to issue execution or apply for an order for committal. Such a course is obviously undesirable in the interest both of master and of workman: it is impolitic for the master to embitter the relations between himself and a workman still in his service, either by selling him up or by obtaining his imprisonment and

(1) [1906] A. C. 136.

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so depriving himself of his services, and it is certainly inexpedient for the workman to suffer the extra expense and inconvenience of execution or imprisonment. In the majority of cases between master and workman the hiring would be either weekly or fortnightly, and it would be very improbable that a plaint in the county court or a summons before a magistrate would be heard before wages accruing due at the time that it was taken out had become due and payable. It was also improbable that a workman who was sued for breach of contract would trouble himself to plead a set-off of wages which could not be retained against him in advance and which he was entitled to receive in cash. Set-off was available under the County Court Act then in force, 9 & 10 Vict. c. 95, s. 76.

In this state of things the Act of 1875 was passed: the contention that the object of the Act was merely to enlarge the ambit of subject-matter of set-off by including all claims, whether liquidated or unliquidated, or whether for wages, damages, or otherwise, appears to me untenable: the words do, no doubt, enlarge the subject-matter, but it is impossible, in my opinion, to read the section as confined to that. If it were so, the Act is the worst of all the ill-drawn Acts in the statutes at large. The Legislature appears to have realized the inconvenience of the position that I have just stated, and, considering that the amount in dispute between master and workman would probably be small, to have intended to leave it to the judge, when the matter comes before him at the trial, to make a final end of all claims which either might then have against the other. It appears to me to be a further development of the principle underlying the Truck Act, 1831, and set-off in claims thereunder, as stated by Lord Atkinson in *Williams* v. *North's Navigation Collieries* (1), where his Lordship says: "The whole principle upon which this legislation is based is that the workman requires protection, that if not protected he may be over-reached; and it is quite consistent with that principle to hold that in any such action brought by him to recover his wages, he may be liable to have the sum found on investigation before the legal tribunal to be

(1) [1906] A. C. at p. 146.

due to him by his master diminished by the sum found by the same tribunal on the same occasion to be due by him to his master, and yet at the same time to prohibit the master from, as it were, substituting himself for the legal tribunal, investigating his own claim against his workman in his own office and deciding in his own favour." The master is not allowed to make deductions from the wages, but it may well be in the interest of both parties that a judge should have power when either has commenced a proceeding before him to make a final end, not merely of all pending actions, but of all conflicting claims which the parties litigating may have at the time that the matter in litigation comes up for adjudication before him.

Approaching the Act from this point of view of development of the final settlement of all disputes between master and workman, I find the words of the Act quite appropriate to carry this object into effect: s. 3 requires the existence of "any proceeding before a county court in relation to any dispute between an employer and a workman arising out of or incidental to their relation as such"; the Court is then given certain powers "in addition to any jurisdiction it might have exercised if this Act had not passed." Such pre-existing jurisdiction includes a power to allow set-off under the then County Court Act and the Truck Act and to give judgment and to enforce such judgment by execution and committal. The first of these new powers is to adjust and set off; this is not a mere allowance of set-off: "adjust" is a term familiar in Chancery proceedings where accounts have to be settled finally; *In re Calgary and Medicine Hat Land Co.* (1) is the latest instance in the books; no such phrase is to be found in any of the statutes or rules allowing set-off, but the term is peculiarly appropriate to a case of adjustment of claims accrued and accruing which it is desirable finally to settle. Then the Act provides that the subject-matter of such adjustment and set-off is to be "all such claims on the part either of the employer or of the workman, arising out of or incidental to the relation between them, as the Court may find to be subsisting"; the words are "claims on the

(1) [1908] 2 Ch. 652.

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part of," not claims "raised or made by"; nor are they such as the Court may have adjudged to have been proved, but "as the Court may find to be subsisting." It is, in my opinion, clear that the time at which this adjustment is to be made is at the hearing of the proceedings that is the initiation and foundation of the jurisdiction given by the Act, and that the judge is not confined to claims raised by plaint or defence or set-off, but is to consider all claims in the widest sense that either party can at the hearing make upon the other. For instance, a master sues for damages for breach of contract and the case is heard on a Thursday: the workman has then a claim for wages accrued but not payable until Saturday; it is open to the judge under this section, instead of giving judgment and allowing execution to issue, to adjust and set off the wages accrued: it is plain that without the Act the judge could direct execution not to issue until after the Saturday, and not at all if the workman was paid on the Saturday; it is plain also that the master could refrain from paying the Saturday wages and wait for the workman to sue him, when he could set off the judgment debt. The Act was intended to enable the judge to make the terms on which he could have stayed execution effectual without its being dependent on the willingness of the defendant to pay on the Saturday, and to save the parties the expense of a further action for the purpose of set-off. It is quite clear that under s. 3, sub-s. 2, the time for the exercise of the power thereby given to him is the trial of the proceeding before him, and as the powers of the judge are clearly discretionary, I see no reason to fear any unreasonable exercise thereof by applying them in cases which might operate hardly on either side. I do not myself think that r. 2 has any application to the present case, and the rules cannot in any event restrict the operation of the Act. The master in the present case very properly gave notice of his intention to apply to the judge to exercise his powers, not because any rule bound him to do so, but because the judge would probably have adjourned the case in order to give notice to the workman if he had not appeared, or to give him time to consider his position if he had appeared and said he was taken by surprise.

I am therefore of opinion that this appeal should be dismissed,

although not on the same grounds as the grounds relied on by the majority of the Divisional Court.

Appeal dismissed.

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Solicitors for appellant: *Smith, Rundell & Dods, for Morgan, Bruce, Nicholas & James, Pontypridd.*

Solicitors for respondents: *Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare.*

W. J. B.

WATERS, APPELLANT *v.* PHILLIPS, RESPONDENT.

1910 *June* 17.

Game—Ground Game—Occupier with Sporting Rights—Prohibition against setting Spring Traps except in Rabbit Holes—Ground Game Act, 1880 (43 & 44 *Vict. c.* 47), *s.* 6.

Sect. 6 of the Ground Game Act, 1880, after providing that no person having a right of killing ground game under this Act or otherwise shall use any firearms for the purpose of killing ground game between certain hours, proceeds to enact that "no such person shall, for the purpose of killing ground game, employ spring traps except in rabbit holes":—

Held, that this enactment applies to an occupier of land who, by reason of the owner not having reserved the sporting rights, has the right, apart from the Act, of killing and taking game upon the land.

Saunders v. *Pitfield*, (1888) 58 L. T. 108, followed.

CASE stated by justices for the county of Cornwall.

An information was preferred by the appellant, an inspector of the Royal Society for the Prevention of Cruelty to Animals, under s. 6 of the Ground Game Act, 1880 (1), against the respondent for that he on December 14, 1909, did unlawfully employ for the purpose of killing ground game, to wit, rabbits, sixty-seven spring traps, the said traps being set otherwise than in rabbit holes, contrary to the statute.

At the hearing the following facts were proved or admitted:—The respondent was the tenant and occupier of a farm in Cornwall under a verbal yearly tenancy granted to him by the owner of

(1) 43 & 44 Vict. c. 47, s. 6: "No person having a right of killing ground game under this Act or otherwise shall use any firearms for the purpose of killing ground game between the expiration of the first hour after sunset and the commencement of the last hour before sunrise;

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the farm. There was no reservation by the owner of any sporting rights over the farm. On December 14, 1909, the respondent set sixty-seven spring traps at various places on the farm for the purpose of catching rabbits. The traps were not set in rabbit holes in accordance with s. 6 of the Ground Game Act, 1880.

It was contended on behalf of the respondent that s. 6 of the Act did not apply to him because there was no reservation by the owner of any sporting rights over the farm.

It was contended on behalf of the appellant that s. 6 applied to the respondent, and the case of *Saunders* v. *Pitfield* (1) was referred to in support of this contention.

The justices, on referring to the cases of *Smith* v. *Hunt* (2), *Anderson* v. *Vicary* (3), and *May* v. *Waters* (4), were of opinion that the Ground Game Act, 1880, applied only to occupiers who, apart from the Act, would have no right to kill and take the ground game (per Romer L.J. in *Anderson* v. *Vicary* (5)), and therefore did not apply to the respondent, who had an absolute right to the game apart from the Act. They accordingly dismissed the information.

The question for the opinion of the Court was whether the justices came to a correct determination in point of law. If the Court was of opinion that the determination was right, the information was to stand dismissed; if not, then the Court was to remit the case to the justices that they might convict.

Stuart Bevan, for the appellant. Sect. 2 of the Ground Game Act, 1880, includes an occupier of land who is entitled otherwise than in pursuance of the Act to kill and take ground game thereon, that is to say, it includes an occupier of land where there is no reservation by the owner of the land of the sporting rights thereon, and it expressly makes him subject to s. 6 of the Act. In *Saunders* v. *Pitfield* (1) it was decided that an occupier of

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and no such person shall, for the purpose of killing ground game, employ spring traps except in rabbit holes, nor employ poison; and any person acting in contravention of this section shall, on summary conviction, be liable to a penalty not exceeding two pounds."

(1) 58 L. T. 108.
(2) (1885) 54 L. T. 422.
(3) [1900] 2 Q. B. 287.
(4) [1910] 1 K. B. 431.
(5) [1900] 2 Q .B. at p. 295.

land, where the owner had not reserved the shooting rights, comes within the provisions of s. 6. That case is exactly in point, and it was referred to in *May* v. *Waters* (1), and no doubt was expressed as to the correctness of the decision. *Smith* v. *Hunt* (2) has no application, as there the occupier was also the owner of the land and retained the sporting rights over it. If there is an occupier of land, who is not the owner, s. 6 applies, though he has the sporting rights as well. The justices, therefore, ought to have convicted.

H. M. Sturges, for the respondent. The Ground Game Act, 1880, only comes into operation when the sporting rights and the occupation of the land are severed: *Anderson* v. *Vicary*. (3) The object of the Act is to give to the occupying tenant the right to kill and take the ground game where the owner has reserved the sporting rights. The title and preamble of the Act shew that its object is to enable the occupiers of land to protect their crops against injury from ground game, and for that purpose the Act confers upon the occupier of land the right to kill and take ground game thereon, and it prohibits him from parting with that right. That right is subject to the limitations imposed by s. 6. There is no necessity for the application of the Act where the occupier has the sporting rights over the land. It is only necessary where the sporting rights are in a person other than the occupier. Therefore the limitations imposed by s. 6 do not apply where the occupier has the sporting rights over the land. As Vaughan Williams L.J. said in *Anderson* v. *Vicary* (4) when discussing *Smith* v. *Hunt* (2), "That was a case in which the occupying owner appears to have retained his right of sporting. There was no occasion in such a case that any legislation should come into force to prevent prejudice to the occupier of agricultural land by reason of the separation of the right of sporting from the occupation of the land, and the limitations and conditions mentioned in the Act are only intended to apply where there is such a separation." Romer L.J. also said (5) that the Act only dealt with occupiers who, apart from

(1) [1910] 1 K. B. 431.
(2) 54 L. T. 422.
(3) [1900] 2 Q. B. 287.
(4) [1900] 2 Q. B. at p. 294.
(5) [1900] 2 Q. B. at p. 295.

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the Act, would have no right to kill the ground game; and that the protection of the Act was necessary in every case where an occupier was prevented, by reason of the right of sporting not being in his own hands, from keeping down the ground game. Sect. 3 of the Act, which makes all agreements in contravention of the right of the occupier as given to him by the Act void, can only refer to an occupier who has, by virtue of the Act, the right under s. 1 to kill ground game, and that right is subject to the limitations imposed by s. 6. The respondent does not come within any of the sections of the Act, as he has the sporting rights over the land, and therefore the limitations imposed by s. 6 do not apply to him. The decision in *Saunders* v. *Pitfield* (1) is not consistent with the subsequent decision of the Court of Appeal in *Anderson* v. *Vicary* (2) and cannot now be regarded as law. The decision of the justices was therefore right.

Stuart Bevan did not reply.

LORD ALVERSTONE C.J. In my opinion this appeal must succeed. Sect. 6 of the Ground Game Act, 1880, provides that "no person having a right of killing ground game under this Act or otherwise shall use any firearms for the purpose of killing ground game between the expiration of the first hour after sunset and the commencement of the last hour before sunrise; and no such person shall, for the purpose of killing ground game, employ spring traps except in rabbit holes." The decisions upon that section stand thus. In *Smith* v. *Hunt* (3) it was held that the section has no application to the owner who has retained the sporting rights and who is himself the occupier of his own land. The case of *Saunders* v. *Pitfield* (1) was decided a little over two years later, but before I deal with that case I wish to refer to the recent case of *May* v. *Waters* (4), where this Court decided that s. 6 does not apply to the grantee of sporting rights over the land where he is not the occupier of the land over which those rights are granted. In other words, the shooting tenant, who is not the occupier of the land, is not subject to the restrictions imposed by s. 6. I

(1) 58 L. T. 108.
(2) [1900] 2 Q. B. 287.
(3) 54 L. T. 422.
(4) [1910] 1 K. B. 431.

now come to *Saunders* v. *Pitfield* (1), where it was decided that the occupying tenant of land, who, by reason of there being no reservation by the owner of the sporting rights, is entitled to the sporting rights over the land, is subject to the restrictions imposed by s. 6, and is liable to a penalty for setting spring traps otherwise than in rabbit holes. Such an occupier comes within s. 2 of the Act. That section, after providing that, where the occupier of land is entitled otherwise than in pursuance of the Act to kill and take ground game thereon, he shall, if he gives any other person a right to kill and take ground game, retain and have, as incident to and inseparable from his occupation, the same right to kill and take ground game as is declared by s. 1 of the Act, goes on to enact that "save as aforesaid, but subject as in section 6 hereafter mentioned, the occupier may exercise any other or more extensive right which he may possess in respect of ground game or other game in the same manner and to the same extent as if this Act had not passed." Sect. 2 therefore contemplates an occupier having a right apart from the Act to kill and take ground game, and it makes him subject to the restrictions imposed by s. 6. Accordingly we cannot decide this case in favour of the respondent without overruling *Saunders* v. *Pitfield* (1), which, while recognizing the decision in *Smith* v. *Hunt* (2) to be good law, decided that the occupier who has the sporting rights over the land by reason of there being no reservation of those rights by the owner is subject to s. 6. That was a decision of Mathew and A. L. Smith JJ. and it has stood for twenty-two years; it was recognized as an authority in *May* v. *Waters*. (3) It is said that it is inconsistent with the decision of the Court of Appeal in *Anderson* v. *Vicary* (4), and must therefore be considered as no longer law. In that case the tenant of the sporting rights over certain land sought to restrain the owner of the land, who was also the occupier of it, from killing rabbits on the land, and the Court held that the occupier was entitled to kill the ground game on the land and none the less because he happened to be also the owner. The Court were not there dealing with the method of killing the ground game

(1) 58 L. T. 108.
(2) 54 L. T. 422.
(3) [1910] 1 K. B. 431.
(4) [1900] 2 Q. B. 287.

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nor with the restrictions imposed by s. 6 upon the right of killing the ground game, and did not intend their observations to apply to a case like the present. *Saunders* v. *Pitfield* (1) was referred to incidentally in the argument, and I cannot see that it was anywhere doubted. We must therefore follow *Saunders* v. *Pitfield*. (1) The principle contended for by counsel for the respondent that s. 6 does not apply unless there is a severance of the shooting rights from the occupation has no application to the case of occupiers who are not also owners of the land. These latter come within the terms of ss. 2 and 6 of the Act. The case must therefore be remitted to the justices with a direction to convict.

GRANTHAM J. I am not prepared to differ from my Lord and my brother Channell, though it is not without some hesitation that I have come to that conclusion. For some reason or other ss. 2 and 6, when taken together, seem to include a person in the position of this occupier, though it certainly seems to be inconsistent with the object of the Act. If the Act goes beyond its apparent object and brings within its provisions a person who, if the object of the Act alone were looked at, would not come within them, we must give effect to it.

CHANNELL J. I am of the same opinion. I think that the language of s. 2 clearly includes a person in the position of the respondent, and therefore he comes within the restrictions imposed by s. 6. When Romer L.J. in *Anderson* v. *Vicary* (2) said that the object of the Act is to protect occupiers of land from injury to their crops by ground game, and that the Act is only dealing with occupiers who, apart from the Act, would have no right to kill ground game, he was referring to the general object of the Act. He did not mean to say that, where some special provision in the Act expressly includes other classes of occupiers, effect must not be given to that provision. He was not dealing with the question before us, and therefore he never intended to say that an occupying tenant, where the shooting rights were not reserved by the owner,

(1) 58 L. T. 108. (2) [1900] 2 Q. B. at p. 295.

was not within the express words of s. 2 and as such subject to the restrictions imposed by s. 6.

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Appeal allowed.

Solicitor for appellant: *S. G. Polhill.*

Solicitors for respondent: *Robbins & Co., for Nalder, Hockin & Co., Truro.*

W. F. B.

[IN THE COURT OF APPEAL.]

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HOBBS *v.* WINCHESTER CORPORATION.

Local Government—Public Health—Offences—Sale of Unsound Meat—Seizure—Prosecution—Acquittal—Compensation for Damage from Exercise of Statutory Powers—Costs of defending Prosecution—Default of Claimant—Mens rea—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 116, 117, 308.

Where meat intended for human consumption is exposed for sale and is condemned as unsound, the person in whose possession or on whose premises the meat is found is liable to conviction under s. 117 of the Public Health Act, 1875, whether he is or is not aware of the unsoundness of the meat.

Accordingly, where a summons was taken out by a local authority under s. 117 against a butcher for selling for human consumption meat condemned as unsound but was dismissed, and the butcher claimed compensation under s. 308 against the local authority for damage sustained by him by reason of the exercise by the local authority of the powers of the Act, and, upon the matter being referred to arbitration, the umpire found that a small portion of the meat was unsound, but that the butcher and his assistants were unaware of the fact and could not have discovered it by any examination which they could reasonably have been expected to make:—

Held, that the butcher sold the unsound meat at his peril, and that this was a matter as to which he was himself in default within s. 308, and, consequently, that he was not entitled to compensation.

Decision of Channell J., ante, p. 46, reversed.

APPEAL of the defendants from a decision of Channell J., reported ante, p. 46.

Simon, K.C., and *Ernest Charles*, for the appellants. No case arises for compensation under s. 308 of the Public Health Act,

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1875 (1), first, because the prosecution was not an exercise by the local authority of the powers of the Act, and, secondly, because this was a matter as to which the plaintiff was himself in default within the meaning of the section.

Dealing with the second question first, guilty knowledge is not a necessary element of the offence created by s. 117. The precise point has never been decided, but there are dicta to that effect by many eminent judges in several cases: *Mallinson* v. *Carr* (2); *Blaker* v. *Tillstone* (3); *Firth* v. *McPhail* (4); *Dickson* v. *Linton.* (5) Where the Act intends knowledge to be a necessary ingredient it uses the word "wilfully" or "knowingly": see for example ss. 306, 307; and, as was pointed out by Hawkins J. in *Mallinson* v. *Carr* (6), the absence of those words

(1) The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 116: "Any medical officer of health or inspector of nuisances may . . . . inspect and examine any animal carcase meat . . . . exposed for sale, or deposited in any place for the purpose of sale . . . . and intended for the food of man, the proof that the same was not exposed or deposited for any such purpose, or was not intended for the food of man, resting with the party charged; and if any such animal carcase meat . . . . appears to such medical officer or inspector to be diseased or unsound or unwholesome or unfit for the food of man, he may seize and carry away the same himself or by an assistant, in order to have the same dealt with by a justice."

Sect. 117: "If it appears to the justice that any animal carcase meat . . . . so seized is diseased or unsound or unwholesome or unfit for the food of man, he shall condemn the same, and order it to be destroyed or so disposed of as to prevent it from being exposed for sale or used for the food of man; and the person to whom the same belongs or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found, shall be liable to a penalty not exceeding twenty pounds for every animal carcase or . . . . piece of meat . . . . so condemned, or, at the discretion of the justice, without the infliction of a fine, to imprisonment for a term of not more than three months . . . ."

Sect. 308: "Where any person sustains any damage by reason of the exercise of any of the powers of this Act, in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers; and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration in manner provided by this Act . . . ."

(2) [1891] 1 Q. B. 48, 52, per Stephen J.

(3) [1894] 1 Q. B. 345, 348, per Lord Coleridge C.J.

(4) [1905] 2 K. B. 300, 305, per Lord Alverstone C.J.

(5) (1888) 15 R. (J. C.) 76, 80, per Lord M'Laren.

(6) [1891] 1 Q. B. 48.

in s. 117 is worthy of attention. Admittedly knowledge is immaterial for the purposes of s. 116, and, as Day J. pertinently asks in *Blaker* v. *Tillstone* (1), "if the destruction of meat can be ordered without shewing guilty knowledge on the part of the owner, why should he not be fined for its possession without shewing a mens rea?" The general principle, nemo est reus nisi mens sit rea, is subject to exceptions, and, where an offence is created by statute, regard must be had to the scope and language of the statute and to the special circumstances of each particular case: *Coppen* v. *Moore* (No. 2). (2) There is no authority upon s. 117 opposed to the appellants' contention, but in the Court below reliance was placed upon *Reg.* v. *Dennis* (3), a decision upon the corresponding section of the Public Health (London) Act, 1891 (s. 47). That decision, however, really supports the appellants' case, because there the Legislature says that the seller may get out of the section by proving that he did not know and had no reason to believe the meat was unsound. The importance of that proviso is that it shews that, where the Legislature intends to exempt from liability a person who sells unsound meat in ignorance of its condition, it says he must prove want of knowledge, whereas in an ordinary case it would be for the prosecution to prove knowledge. Further, even if no offence was committed under s. 117 the plaintiff is still in default, for he contributed to the result by having diseased meat upon his premises.

As to the first point, the damage which the plaintiff has suffered has not been caused by the exercise by the local authority of any powers at all. The prosecution is the act of the law and is not an exercise of the powers conferred on the local authority. This is, in effect, an attempt to get damages for malicious prosecution without malice. This s. 308 was intended to meet cases of damage arising from the wrongful seizure of meat under s. 116: *In re Bater and Mayor of Birkenhead* (4); *In re Davies and Rhondda Urban District Council* (5); and in the latter case

(1) [1894] 1 Q. B. 345.
(2) [1898] 2 Q. B. 306, 312, per Lord Russell of Killowen C.J.
(3) [1894] 2 Q. B. 458.
(4) [1893] 1 Q. B. 679; [1893] 2 Q. B. 77.
(5) (1899) 80 L. T. 696.

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it was expressly laid down by Darling J. that the statute did not intend to include under the compensation to be awarded under this section the costs of the proceedings before the justices under s. 117. Very shortly after that decision this matter came before the Court of Appeal in *Walshaw* v. *Brighouse Corporation.* (1) At first sight that appears to be opposed to the view taken by the Divisional Court in *In re Davies and Rhondda Urban District Council* (2), which was not brought to the notice of the Court, but *Walshaw* v. *Brighouse Corporation* (1) does not really raise the question which the appellants are raising here. There the claim was for damages sustained by reason of the seizure of the meat, and plainly no one could say that the butcher was in default, because the arbitrator found that the meat was sound. The distinction between the seizure of the meat and the proceedings on the summons was not the point upon which the case mainly turned; the real point was whether or not the arbitrator was entitled to go into the question of the unsoundness of the meat. [Reference was also made to *Brierley Hill Local Board* v. *Pearsall* (3); *Barnett* v. *Eccles Corporation* (4); *Wieland* v. *Butler-Hogan.* (5)]

Horace Avory, K.C., and *Clarke Hall*, for the respondent. As to default, the question is whether, if a man satisfies the Court that neither he nor his servants knew or could with reasonable care have known that the meat was unsound, he is guilty of an offence under the Act. It is submitted that the presumption as to mens rea applies. This, no doubt, is not one of those cases in which it is incumbent on the prosecution to prove knowledge in the first instance, but it is one of those cases in which it is open to the accused to exculpate himself by proving no knowledge and no want of reasonable care in ascertaining the truth.

[KENNEDY L.J. referred to *Reg.* v. *Bishop.* (6)]

Unquestionably there are cases in which the Court has held that the Legislature intended to say that the act committed was an offence irrespective of the question of knowledge or no knowledge, but the question is whether that is the meaning of this Act.

(1) [1899] 2 Q. B. 286.
(2) 80 L. T. 696.
(3) (1884) 9 App. Cas. 595.
(4) [1900] 2 Q. B. 423.
(5) (1904) 73 L. J. (K.B.) 513.
(6) (1880) 5 Q. B. D. 259.

Sherras v. *De Rutzen* (1) illustrates the respondent's contention. The Licensing Act, 1872, s. 16, sub-s. 2, contains an absolute prohibition against supplying liquor to a police constable on duty. In that case the constable was on duty, but had taken off his armlet, which was the badge of duty, and a publican who had served him with liquor was convicted, but the Court quashed the conviction.

[KENNEDY L.J. Wright J. there classifies the exceptions to the rule that a guilty knowledge is an essential ingredient in every offence and includes in those exceptions acts which are not criminal in any real sense but are acts which in the public interest are prohibited under a penalty. I suggest that this case falls within that exception.]

If it is a question of public interest it is just as much in the interest of the public that a constable on duty should not be served with liquor as that people should not eat unwholesome food ; and the presumption as to mens rea is much stronger where, as in this case, imprisonment may be imposed for a first offence. A statute ought not to be so construed as that a man should be liable for a first offence to be sent to prison without the option of a fine in the absence of a mens rea.

[KENNEDY L.J. referred to *Cundy* v. *Le Cocq* (2), where the conviction of a publican for serving a drunken person with liquor was upheld although the publican was unaware of the man's condition.

COZENS-HARDY M.R. referred to *Roberts* v. *Egerton*. (3)]

Under ss. 3 and 4 of the Sale of Food and Drugs Act, 1875, guilty knowledge is a necessary ingredient of the offence ; it is, however, not a necessary ingredient under s. 6, but in that case the punishment is fine only, and by s. 17, sub-s. 2, of the amending Act of 1899 in cases where under any provision of the Sale of Food and Drugs Acts a fine of 50*l*. could be imposed it was made competent to the Court to order imprisonment, but only where the offence "was committed by the personal act, default, or culpable negligence of the person accused," thus shewing the importance which the Legislature attaches to

(1) [1895] 1 Q. B. 918. (2) (1884) 13 Q. B. D. 207.
(3) (1874) L. R. 9 Q. B. 494.

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the distinction between offences punishable by fine and offences punishable by imprisonment. The dicta relied on by the appellants are merely obiter, and they relate to personal knowledge only; it is not said anywhere that it would be immaterial for the accused to prove that he could not with reasonable care have ascertained the truth, and if any of the dicta do go that length they are wrong and ought not to be followed. The only effect of the omission of the word "knowingly" in the section, as was said by Day J. in *Sherras* v. *De Rutzen* (1), is to shift the burden of proof. If it is laid down that any man sells at his peril meat which upon examination is condemned as bad, in however small a degree, that involves that every butcher must keep an analytical expert on his premises. That cannot have been the intention of the Legislature.

On the question whether this was an exercise of the powers of the Act, if the proceedings are authorized to be taken under the Act and are to be paid for out of a fund raised under the Act, the local authority in taking such proceedings are exercising their powers under the Act. *Walshaw* v. *Brighouse Corporation* (2) is conclusive on this point and is binding on this Court.

COZENS-HARDY M.R. This appeal raises a question of undoubted importance as to the true meaning and effect of ss. 116, 117, and 308 of the Public Health Act, 1875. Before reading the material words of these sections it is perhaps convenient to indicate what is the plain and apparent object of the Act with regard to the sale of unsound meat. The object is to prevent danger to the public health by the sale of meat for human consumption in a state or condition in which it is dangerous to human health. The scheme of the Act is this. An inspector is allowed to go into a butcher's shop, and if he sees meat there which he considers to be unfit for human consumption he may at once and ex parte obtain an order from a single justice to destroy it. That is not all. A summons may be taken out to be heard before a bench of justices under which the justices on certain facts proved are empowered to impose a

(1) [1895] 1 Q. B. 918. (2) [1899] 2 Q. B. 286.

penalty of a certain amount or imprisonment for a certain term. Then we find almost at the end of the Act a provision for the recovery of compensation from a local authority who may by the exercise of their powers under the Act have caused damage to an individual. That being the general scheme of the Act, it is quite clear that the policy of the Act was the protection of the public. [The Master of the Rolls read ss. 116, 117, and 308.]

Now in this case the plaintiff, Tom Hobbs, was a butcher who had a contract with the military authorities for the supply of meat to the troops. The terms of the contract are not really material to the present case, but perhaps I ought to mention that by the conditions of that contract he was bound to supply meat of a certain age, namely, in the case of heifer or cow beef not under two or over four years old, and was also bound not to remove any portion of the udder. He did supply meat from a cow twelve years old whose udder had been removed, and a portion of the meat was found unfit for human food. The matter was dealt with by a justice and the meat was condemned and ordered to be destroyed. Then a summons was taken out against Hobbs, who was acquitted. Then a claim for compensation was made and it was referred to arbitration. The umpire made an award practically in the terms of a special case. It contains a short statement of the facts I have mentioned, and then it says this: Par. 13.—"A portion of the said meat so delivered on the 5th day of May, 1908, as aforesaid, that is to say, the left forequarter, at the time when the same was seized and ordered to be destroyed, was diseased and unwholesome and unfit for the food of man, but the rest of the said meat," which he specified, "was sound, wholesome and fit for the food of man and was not diseased, unsound, unwholesome or unfit for the food of man." Par. 14.—"The said Tom Hobbs was unaware at the time when he delivered the said meat that any portion of the same was diseased, unsound, unwholesome, or unfit for the food of man, and so were his servants or agents who were concerned in the slaughtering, dressing, quartering, and delivery of the same. The fact that the said left forequarter was diseased, unwholesome, and unfit for the food of man could not have been discovered by any examination which he or they could reasonably

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have been expected to make. But the said Tom Hobbs was aware that the meat was not in accordance with the conditions of his contract with the War Office." And then the umpire in several distinct paragraphs makes certain findings of heads of damage. Upon that award an action was brought, and in that action Channell J. decided that the plaintiff was entitled to certain heads of damage which I need not particularize because the objection is taken by the appellants that s. 308 has no application to a man who is himself in default, and it is said that Hobbs was himself in default inasmuch as he did in fact expose for sale and sell part of a carcase which was unfit for human food. That raises the question whether the offence under s. 117 is complete by the mere fact of exposing for sale and selling meat unfit for human consumption or whether it is necessary to prove in addition that the butcher knew it was unfit. I say "the butcher" because with great respect to Mr. Avory, who has argued this case with his usual ability, I am unable to appreciate the force of his contention that the doctrine of mens rea can have any application at all unless the person charged has himself the guilty knowledge. In my opinion the offence was complete when the unsound meat was exposed for sale and sold, and I think it is not relevant for the butcher to say "I did not know and my men did not know and neither I nor they with such knowledge as we had having regard to our position in life could have ascertained that the meat was unsound, although experts have subsequently given evidence which has satisfied the arbitrator that such was the case." I think we are not without very clear guidance on this point, although it may be that the exact point has never arisen for decision. Kennedy L.J. has referred to the judgment of Stephen J. in *Cundy* v. *Le Cocq* (1), which seems to me to lay down the true principle which ought to be applied to all cases of this kind. That was not a decision under this particular Act, but was a decision under the Licensing Act, 1872. There a publican was charged with selling intoxicating liquor to a drunken person. He did not know, and his assistants did not know, that the man was drunk, but Stephen J. says this: "I am of opinion that this conviction should be affirmed. Our answer to

(1) 13 Q. B. D. 207.

the question put to us turns upon this, whether the words of the section under which the conviction took place, taken in connection with the general scheme of the Act, should be read as constituting an offence only where the licensed person knows or has means of knowing that the person served with intoxicating liquor is drunk, or whether the offence is complete where no such knowledge is shewn. I am of opinion that the words of the section amount to an absolute prohibition of the sale of liquor to a drunken person, and that the existence of a bona fide mistake as to the condition of the person served is not an answer to the charge but is a matter only for mitigation of the penalties that may be imposed." Then he goes on to say that he was led to that conclusion by the general scope of the Act and by the fact that some of the sections contained the word "knowingly," which was absent from the section which he was there considering. That is a remark which applies with peculiar force to the Public Health Act, 1875, because in many sections to which our attention has been called that word "knowingly" is to be found. But I prefer to go to the decisions upon these particular ss. 116 and 117. The earliest in point of time is *Mallinson* v. *Carr*. (1) It is true that the passage to which I propose to refer is dictum only, but it is a dictum by a judge of great eminence in this branch of the law. Stephen J., after expressing the view that an offence was committed under the Act if a man had in his possession meat intended for human food and unfit for human food without any exposure for sale, says: "It was argued that this construction would render liable to conviction persons who were ignorant of the fact that the meat found in their possession was unfit for human food, and it was said to be an unreasonable intention to impute to the Legislature. I do not think that is the proper way to interpret an Act of Parliament. The true rule is to take the words used in their ordinary and natural sense, and to construe them accordingly, without reference to any supposed intention of the Legislature which cannot be gathered from the natural and ordinary meaning of the words. The short result is that a person in possession of meat intended for human food and unfit for human food is liable to conviction;

(1) [1891] 1 Q. B. 48.

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and, for my own part, I think he is liable whether he knows or does not know that the meat was unfit for human food." The matter came shortly afterwards before the Court in *Blaker* v. *Tillstone* (1), which I agree is not directly in point, but there was a discussion on the Act by Lord Coleridge C.J., in the course of which he says this: "The object of the Act is that people shall not be exposed to the danger of eating and drinking poison; that anything which is likely to injure life shall not be sold. The question for us is whether the magistrate is bound to insist on direct proof of knowledge on the part of the seller of the bad condition of the stuff sold. Perhaps it might be an answer to this contention to say that the Act of Parliament would be nugatory if such proof were insisted on, for it would then always be open to the defendant to say that he was not aware of the condition of the article sold, and that it was not his duty under the statute to make any inquiries on the point, with the obvious result that a man might in practice go on selling meat which was positively injurious without the possibility of getting a conviction against him." Then there was an intermediate case, *Wieland* v. *Butler-Hogan* (2), to which I do not think it necessary to refer more fully, but in 1905 the matter came before the Divisional Court, consisting of Lord Alverstone C.J., Kennedy and Ridley JJ., in *Firth* v. *McPhail*. (3) In that case there are certain observations by the Lord Chief Justice, in which I desire to express my full concurrence and which, if they are sound, cover this case. He says: "I see no reason to doubt the decision in *Blaker* v. *Tillstone*. (1) I think that, having regard to the particular language of the section and to the object of the Legislature, there is no reason why the person who has actually in his possession the article intended for the food of man should not be liable to the penalty, and that was the view which this Court took in *Wieland* v. *Butler-Hogan* (2), though we held that there was no evidence of the article having been intended for the food of man after it had become bad. I therefore do not think that we can give effect to the argument that mens rea or guilty knowledge is necessary in every offence

(1) [1894] 1 Q. B. 345. (2) 73 L. J. (K.B.) 513.
(3) [1905] 2 K. B. 300.

under the section." Then it is said that this is a criminal offence and that we ought not to construe this section according to that which is its plain and reasonable meaning because a criminal offence is committed which may involve imprisonment. The answer to that contention is that reliance may be placed upon the justices not to send a man to prison in a case where he did not know the meat was unsound. In such a case the justices would impose either a reasonable fine or no fine at all. For these reasons I cannot agree with the judgment of Channell J. I think that the plaintiff was in default and that this appeal must be allowed.

FARWELL L.J. I am of the same opinion. It certainly seems startling that a butcher who did in fact sell meat unfit for human food should be able to get compensation for damage from the corporation who prosecuted him. In my opinion he was in default and, if it be the same proposition, was also liable to be convicted under s. 117 of the Public Health Act, 1875, which, as its name implies, is for the purpose of protecting the public in their health. The particular sections, 116 and 117, which relate to unsound meat are contained in Part III. of the Act, which is headed "Sanitary Provisions." And I observe that the sections which precede them deal with nuisances and offensive trades and the sections which follow them relate to infectious diseases and the prevention of epidemic diseases. The sections as to unsound meat are sandwiched in between these two groups, from which it appears that one of the dangers to health against which the Legislature intended to protect the public was the sale of unsound meat. Who is to take the risk of the meat being unsound, the butcher or the public? In my opinion the Legislature intended that the butcher should take the risk and that the public should be protected, irrespective of the guilt or innocence of the butcher. The knowledge or possible means of knowledge of the butcher is not a matter which affects the public; it is the unsound meat which poisons them; and I think that the Legislature intended that the butcher should sell unsound meat at his peril. Sect. 116 provides for the seizure of unsound meat. Sect. 117 deals with the

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meat so seized, and a penalty is imposed on the person to whom the same belonged at the time of exposure for sale, or in whose possession or on whose premises the same was found. I find nothing in that section about knowledge or possible means of knowledge, and it is perfectly clear that knowledge is not required under s. 116. There is nothing either in the words of the Act or in the general purview of the Act which would in any way justify such a claim as is now put forward by the butcher who actually sold the meat.

In my opinion this case is covered by the authorities which have been cited, and I think that those authorities are quite right. The illustrations given by Wright J. in *Sherras* v. *De Rutzen* (1) shew to what a length the Legislature has gone for the protection of the public in making dealers in articles of human food responsible for the wholesomeness of the goods which they sell to the public whether they did or did not know what was the condition of the goods. I think that the appeal should be allowed.

KENNEDY L.J. I am of the same opinion. We are giving our judgment on the one point whether this was a matter as to which, in the words of the Act of Parliament in the section to which we have been referred, s. 308, the present plaintiff was himself in default. The case has been argued, as it must be, upon the basis of the earlier sections, 116 and 117. Is it sufficient for the purpose of s. 117, under which the plaintiff was prosecuted, that he should have been shewn to have been in the position of the person referred to in that section, or is it necessary to say that into that section must be read a proviso, such as Mr. Avory sought to formulate, that no person should be said to be in default in respect of the provisions of the Act relating to the sale of meat unless he was a person to whom the term mens rea could be applied? Now, in the first place, reading the section literally, that is to say in its natural sense, there is no word or phrase or form of expression which indicates that the meaning of that section is that the essence of the offence lies in the exposure for sale of meat with the

(1) [1895] 1 Q. B. 918.

knowledge of the person who is in possession of the meat or on whose premises it is found that the meat was in fact, as described by the Act, "diseased or unsound or unwholesome or unfit for the food of man." But it is said that the statute means such knowledge to be implied. Wishing to do full justice to Mr. Avory's argument, I observe that he does not say the implication is that the prosecution must in the first instance prove knowledge, but his contention, if I follow him, is that, while it would be a sufficient case for the prosecution to prove the exposure of unsound meat in the first instance, it would be a good answer if it could be shewn by the defence that the mens rea did not exist. Taking the cases as a whole and admitting that some of them might give some ground for such an argument, I think there is a clear balance of authority that in construing a modern statute this presumption as to mens rea does not exist. I think with great respect to my brother Channell that he has applied to the construction of this modern statute a maxim which is recognized as applicable to offences at common law, and it may be, as Stephen J. suggests in *Cundy* v. *Le Cocq* (1), also to offences under the earlier statutes which are to be treated on the same basis as offences under the common law. To quote his words, so far as they have not been quoted—and I accept the view which Stephen J. there states — "In old time, and as applicable to the common law or to earlier statutes, the maxim " —that is, the maxim that in every criminal offence there must be a guilty mind—" may have been of general application; but a difference has arisen owing to the greater precision of modern statutes. It is impossible now, as illustrated by the cases of *Reg.* v. *Prince* (2) and *Reg.* v. *Bishop* (3), to apply the maxim generally to all statutes, and the substance of all the reported cases is that it is necessary to look at the object of each Act that is under consideration to see whether and how far knowledge is of the essence of the offence created." Then let us turn to this particular statute. The clear object, the important object, so far as these sections are concerned is, as far as possible, to

(1) 13 Q. B. D. 207. (2) (1875) L. R. 2 C. C. R. 154.
(3) 5 Q. B. D. 259.

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Kennedy L.J.

protect the buyer of that which, in the opinion at all events of most people, is a necessity of human life, from buying and consuming meat that is unwholesome and unfit for the food of man; and I should say that the natural inference from the statute and its object is that the peril to the butcher from innocently selling unsound meat is deemed by the Legislature to be much less than the peril to the public which would follow from the necessity in each case of proving a mens rea. Mr. Avory's argument on this point was, as it seems to me, to some extent novel, because mens rea naturally means the guilty mind of the person charged; but he did not contend that it was a sufficient defence for Hobbs to have said that he did not know and his servants did not know that the meat was unsound, because he goes on to add (and Channell J. takes the same view), that in order to make good his defence Hobbs was bound to prove further that no reasonable examination on the part of himself or his servants, having regard to the state of their knowledge, would have enabled them to discover the fact of the unsoundness. Channell J. refers to the difficulties which would arise in a case like this where the disease cannot be reasonably discovered except by an expert. He lays stress on the fact that the plaintiff would require not only to have an analyst on the premises, but must be held to warrant or answer for the accuracy and skill of the analyst. Speaking for myself, I am of opinion that to apply such a test of responsibility as is suggested would be on public grounds most dangerous. A man takes upon himself to offer goods to the public for their consumption with a view to making a profit by the sale of them. Those goods may be so impregnated with disease as to carry death or at any rate serious injury to health to any one consuming them. To say that the difficulty of discovering the disease is a sufficient ground for enabling the seller to excuse himself on the plea that he cannot be reasonably expected to have the requisite technical knowledge or to keep an analyst on his premises, is simply to say that the public are to be left unprotected and must submit to take the risk of purchasing an article of food which may turn out to be dangerous to life or health. I think that the policy of the Act is this: that if a man chooses for profit to engage in a business which involves

the offering for sale of that which may be deadly or injurious to health he must take that risk, and that it is not a sufficient defence for any one who chooses to embark on such a business to say "I could not have discovered the disease unless I had an analyst on the premises." He has chosen to engage in that which on the face of it may be a dangerous business and he must do so at his own risk. I think the view taken by Stephen J. in *Cundy* v. *Le Cocq* (1) is borne out by the balance of authority ever since, and if there cannot be found either in the words of the statute or in the nature of its object anything which is inconsistent with the view that the words of the statute ought to be read in their natural meaning, then I think that the conclusion to which we are invited by the corporation to come is the right conclusion, and that there has been in this case a default by the plaintiff. I only wish to add this. Great stress is laid on the character of the punishment that may be inflicted under s. 117. I protest for myself that we are not to assume that where a judicial discretion is granted by the Legislature the tribunal, whatever its rank may be, exercising that discretion will exercise it otherwise than in a judicial manner. Because there may be a case, as there obviously may be, in which a man unknowingly exposes for sale food which is dangerous to health, and because the offence created by the statute is punishable by imprisonment in the first instance, that to my mind is not a ground for holding that a mens rea must be shewn in every case. If it is shewn that the man had no guilty knowledge the magistrate would probably inflict a merely nominal fine; and, under modern legislation, I think, he need not even convict at all where there is only a trifling breach of the law; but in any case he has a wide discretion. For these reasons I think that this appeal should be allowed.

COZENS-HARDY M.R. As we have dealt in our judgment only with the default point, I desire to say for myself that it must not be taken that as at present advised I am able to follow the reasoning of the Court of Appeal in *Walshaw* v. *Brighouse Corporation*. (2)

(1) 13 Q. B. D. 207.

(2) [1899] 2 Q. B. 286.

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FARWELL L.J. I agree. I confess I do not understand that case.

KENNEDY L.J. I agree.

Appeal allowed.

Solicitors for appellants: *Mellor & Co., for T. Holt, Winchester.*
Solicitors for respondent: *W. T. Ricketts & Son.*

H. B. H.

1910
March 23;
April 27.

SAPWELL *v.* BASS.

Damages—Remoteness—Breach of Contract—Contingent Profits.

It was agreed at the beginning of 1908 between the plaintiff, who was a breeder of racehorses, and the defendant, who was the owner of a stallion, that the defendant's stallion should during the season of 1909 serve one of the plaintiff's brood mares in consideration of a sum of 315*l.* to be paid by the plaintiff to the defendant at the time of the service. The defendant in the summer of 1908 sold the horse to a purchaser in South America, and thus precluded himself from carrying out the contract. In an action for breach of contract, the plaintiff gave evidence that the profit he had made from the sale of foals by the same stallion out of other mares belonging to him considerably exceeded the 315*l.*, and he claimed damages upon the footing that he had in all probability lost a valuable foal:—

Held, that the damages claimed were too remote and contingent, and that the plaintiff was only entitled to nominal damages.

ACTION tried before Jelf J. without a jury.

The statement of claim alleged that by an agreement in writing contained in two letters, namely, (1.) from the plaintiff to the defendant's agent, Lord Marcus Beresford, dated December 28, 1907, and (2.) from Lord Marcus Beresford to the plaintiff, dated January 2, 1908, it was agreed between the plaintiff and the defendant that a certain stallion named Cyllene, the property of the defendant, should during the season of 1909 serve one of the plaintiff's brood mares in consideration of the sum of 315*l.*, which the plaintiff agreed to pay to the defendant for the said service; that the plaintiff was always ready and willing to pay to the

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defendant the sum of 315*l.* for the service referred to in the agreement, and by letter, dated February 15, 1909, addressed to the defendant made application for the service, but the defendant repudiated the agreement and refused to give the plaintiff the service, by reason whereof the plaintiff lost the benefit of the service and suffered damage. The plaintiff claimed damages.

The defendant, in his defence, denied that any agreement was contained in the letters; he alleged that Lord Marcus Beresford was not authorized to make the alleged agreement; he denied that he repudiated the alleged agreement or refused to give to the plaintiff the service referred to; in the alternative he alleged that it was an implied term of the agreement that he should be at liberty to sell the horse subject to engagements, and that in or about June or July, 1908, he sold the horse subject to engagements to a purchaser in South America, and that the plaintiff had notice of the sale by notices in the newspaper in July, 1908. The defendant further alleged that the plaintiff had not suffered any damage by the alleged breach of the agreement.

The following statement of facts is taken from the judgment of the learned judge:—

The plaintiff is a well-known and experienced breeder of race-horses, and the defendant, Sir William Bass, was the owner of a famous stallion called Cyllene.

On April 21, 1909, the plaintiff sued the defendant for damages for breach of an alleged contract made by correspondence in December, 1907, and January, 1908, whereby it was agreed between the plaintiff and Lord Marcus Beresford (as agent for the defendant) that Cyllene should in the season of 1909 serve one of the plaintiff's brood mares to be selected by the plaintiff for a fee of 315*l.* to be paid at the time of the said service by the plaintiff to the defendant.

In the summer of 1908 the defendant, without the consent of the plaintiff and without previous notice to him, sold Cyllene for 30,000*l.* to go to South America. By letter of July 10, 1908, the plaintiff complained to Lord Marcus Beresford of this, and asked what the defendant proposed to do, adding, "If having taken a subscription to Cyllene I omitted to send a mare to him

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I should have been liable all the same for 300 guineas, and I presume if Mr. Bass" (now Sir William Bass) "omits to provide the horse for my mare he is subject to that or a larger forfeiture." Lord Marcus replied on July 19, 1908: "Cyllene has never been advertised to stand as a stallion for 1909, and I merely took the subscription in case he did stand at my farm, but the horse has been sold, so neither you nor Mr. Bass are liable for anything." The plaintiff replied on July 20, 1908, disputing the right of the defendant to set up the above answer, and continued: "I am advised that I am entitled to claim a sum equal to the average profit I have made on the horse in the past. In that case my loss would represent 700 guineas,

"For my first Cyllene yearling 'Auroform' made	850	guineas,
my second ,, 'Sweet Mary'	840	,,
my third ,, 'Ravenna'	710	,,
my fourth this year	900	,,
	3300	
less stud fees 150, 150, 100, 100	500	
	4)2800	
	700	guineas,

in addition to increase in value of their dams." (1)

But the plaintiff went on to say that he did not want his "pound of flesh," and suggested a compromise, adding, "It struck me that the present would be a good time to settle the matter, but of course I can take no steps until next spring." It appeared that the plaintiff was unaware of the cases of *Frost* v. *Knight* (2), *Hochster* v. *De la Tour* (3), and *Roper* v. *Johnson* (4), and thought that he must wait till the season of 1909 before treating the contract as broken, as he was entitled to do. The defendant, however, refused all idea of compromise.

(1) Evidence was given on behalf of the plaintiff in support of these figures, and it was also admitted that Cyllene had in 1908 served a mare named Ravencula, belonging to the plaintiff, at a fee of 300 guineas, and that the mare on that occasion proved barren.

(2) (1872) L. R. 7 Ex. 111.

(3) (1853) 2 E. & B. 678.

(4) (1873) L. R. 8 C. P. 167.

Further correspondence followed, Lord Marcus Beresford amongst other things saying that the defendant would make arrangements with the purchaser of Cyllene to take over the subscription for 1909, and suggesting that the plaintiff should send the mare to the ranch 500 miles from Buenos Aires. The plaintiff ridiculed this and other contentions put forward on behalf of the defendant. Ultimately at the beginning of the season of 1909 the plaintiff claimed the fulfilment of the contract, which was repudiated by the defendant, and this action was then brought claiming substantial damages. In the meanwhile the plaintiff acted, as I find, reasonably in making the next best arrangement he could to minimize damages by sending one of his brood mares, Dear Mary (which he had intended to send to Cyllene), to Cicero, the son of Cyllene. Cicero was considered a very good coming horse, and was a winner of the Derby, but his reputation as a sire was of course not yet established. By Cicero Dear Mary became in due course in foal.

The defendant pleaded and set up at the trial a variety of defences, amongst others that Lord Marcus Beresford was not his agent, that there was no complete contract, that there was no breach, and that there was no damage. All of these defences except the last were, in my opinion, wholly untenable and frivolous, and I considered that the contract had been broken and repudiated by the defendant in a high-handed and wholly unreasonable manner, and I was desirous, if I properly could, to find some mode of legally making the defendant compensate the plaintiff for the way in which he had been treated.

March 23. *Sir F. Low, K.C.*, and *Henlé*, for the plaintiff. The plaintiff is entitled to substantial and not merely nominal damages for the breach of contract. The plaintiff has lost the probable fruit resulting from Cyllene serving a suitable mare, and is entitled to reasonable damages for the breach by the defendant of the contract: *Inchbald* v. *Western Neilgherry Coffee Co.* (1) It is a question of probability. The Court must be guided by the fact that Cyllene had successfully served mares belonging to the plaintiff on former occasions. The plaintiff

(1) (1864) 17 C. B. (N.S.) 733.

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carries on the business of breeding racehorses, and the evidence shews that he has lost a reasonable prospect of getting a profitable foal. The defendant knew, when he made the contract, that the plaintiff was a breeder of racehorses, and that Cyllene's service was wanted for the purpose of getting a foal which could be sold. The natural and reasonable expectation was that the mare would have a foal, and the evidence shews that the foal would have been a profitable one. Damages which are the ordinary and natural result of the breach of contract are recoverable, and loss of profits can be recovered if they were within the contemplation of the parties at the time when the contract was made as the result of the breach: *Simpson* v. *London and North Western Ry. Co.* (1); *Hydraulic Engineering Co.* v. *McHaffie.* (2) If a profit would arise from a chattel and it is left with a tradesman for repair, and is detained by him beyond the stipulated time, the measure of damages is prima facie the sum which would have been earned in the ordinary course of employment of the chattel in the time: *In re Trent and Humber Co., Ex parte Cambrian Steam Packet Co.* (3) The plaintiff is therefore entitled to substantial damages, and in assessing those damages the average value of Cyllene's foals is a guide to assist the Court. [*Fletcher* v. *Tayleur* (4), *Roper* v. *Johnson* (5), *Grébert-Borgnis* v. *Nugent* (6), and Mayne on Damages, 8th ed., p. 11, were also referred to.]

Hohler, K.C., and *Cababé*, for the defendant. The plaintiff is only entitled to nominal damages. The damages claimed are too remote and contingent. There were a large number of contingencies upon which the expectation of profit arising from the contract depended, such as that the mare selected for the service would have a foal, that the foal would live, that the foal would be worth more than 300 guineas, and various others. The first of the above contingencies is illustrated by the fact that in 1908 the mare Ravencula, though served by Cyllene, was then barren. The plaintiff is really suing the defendant as if he were

(1) (1876) 1 Q. B. D. 274.
(2) (1878) 4 Q. B. D. 670.
(3) (1868) L. R. 6 Eq. 396; 4 Ch. 112, at p. 117.
(4) (1855) 17 C. B. 21.
(5) L. R. 8 C. P. 167.
(6) (1885) 15 Q. B. D. 85.

an insurer that the mare selected for Cyllene would have a foal and upon that footing he is claiming damages for the loss of a sound, healthy foal which he might have sold at a profit. The defendant never entered into such a contract. "The question is not what profit the plaintiff might have made, but what profit he professed to be purchasing. Not what damage he actually suffered, but what the other contemplated and undertook to pay for. It is quite clear that loss of profits by a resale can never be contemplated, unless the resale has actually taken place at the time and is communicated to the other party. The reason is that such a profit is utterly incapable of valuation": Mayne on Damages, 1st ed., p. 18; 8th ed., p. 72; cited in *Williams* v. *Reynolds*. (1) Remote and hypothetical possibilities cannot be taken into consideration in the assessment of damages. A mere chance is not enough: *Watson* v. *Ambergate, Nottingham, and Boston Ry. Co.* (2) He is therefore only entitled to nominal damages. [*Wilson* v. *Lancashire and Yorkshire Ry. Co.* (3) *Schulze* v. *Great Eastern Ry. Co.* (4), *Hiort* v. *London and North Western Ry. Co.* (5), and Sedgwick on Damages, 8th. ed., vol. 1, pp. 245 et seq., 293, were also referred to.]

Next, even if the plaintiff is entitled to recover more than nominal damages, he has not proved any damage beyond the 215*l.*, the difference between 315*l.*, the sum he agreed to pay for Cyllene, and 100*l.*, the sum he actually paid for Cicero. The plaintiff, by the breach of contract, is the richer by 215*l.* He has not proved any out-of-pocket expenses. He is therefore not entitled to recover any damages.

Sir F. Low, K.C., in reply.

Cur. adv. vult.

April 27. JELF J. read the following judgment:—This action, which raised an important question as to the measure of damages for breach of contract, was brought by Colonel Sapwell against Sir William Bass, and was tried before me without a jury at the last Norwich Winter Assizes, and afterwards heard on further

(1) (1865) 6 B. & S. 495, at pp. 502, 506.
(2) (1851) 15 Jur. 448.
(3) (1861) 9 C. B. (N.S.) 632.
(4) (1887) 19 Q. B. D. 30.
(5) (1879) 4 Ex. D. 188.

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consideration in London. [The learned judge stated the facts as above set out, and proceeded :—]

The question of damages presented formidable and to my mind insuperable difficulties. It is clear that if the 300 guineas had been paid the plaintiff could have recovered it back. But he had paid nothing. For obtaining the service of Cicero the plaintiff had to pay a fee of 100*l.* only instead of 300 guineas. No other expenses had been incurred or steps taken by the plaintiff in special preparation for the expected service by Cyllene, for such expenses and steps were all available for the service by Cicero. Neither party could suggest nor could I discover any tertium quid by way of compensation.

The suggestion of Jervis C.J. and Willes J. in *Fletcher* v. *Tayleur* (1), that the average profit made by the use of the chattels not delivered should by analogy with the interest on money not paid be the amount of damages, has not been adopted as a separate rule, and moreover would not be applicable to the present case. It seems to follow that the damages, if any, applicable in this case would be on the one hand the estimated loss of prospective profit on the lines put forward by the plaintiff in the above correspondence and the evidence which was given in respect thereof, or on the other hand nominal damages.

Now it will be observed that the expectation of profit arising from the contract at the time it was made was not and could not be based on any tangible market price of the expected progeny of Cyllene and the undetermined mare, nor on the enhanced prospective price of such mare, but upon a succession of contingencies which could not be foretold more than a year beforehand, such as the following :—(1.) That Cyllene would be alive and well at the time of the intended service. (2.) That the mare sent would be a well-bred one, and that the plaintiff would for his own sake and without any obligation towards the defendant make a good and suitable selection of such mare. (3.) That the mare sent would not prove barren, which had happened to another mare sent by the plaintiff to Cyllene. (4.) That the mare sent would not slip her foal, and that such foal would be born alive and would be strong and healthy. (5.) The chance whether it

(1) 17 C. B. 21.

would be a colt or a filly, the former being more valuable. (6.) That the foal would be all right when offered for sale. (7.) That the relative reputations of Cyllene and other sires and their respective foals would be the same in 1909 as in 1908. (8.) That no substitute for Cyllene (e.g., Cyllene's son Cicero) available in 1909 would equal or excel Cyllene in public estimation or in results. (9.) That Cicero's offspring would not command as good a price as Cyllene's.

Now in a case like this, where there is obviously no actual market price to guide one, and where there is not in the contract any liquidated sum agreed on for damages, one could only rely on the weighing of chances. It was not contended that the contract was one of insurance, or that the fee of 300 guineas payable for the service by Cyllene included any premium payable to the defendant for entering into such an onerous contract. But the law in general regards damages which depend entirely on chances as too remote and therefore irrecoverable. The cases seem to shew that the line may sometimes be difficult to draw between an estimate of damage based on probabilities, as in *Simpson* v. *London and North Western Ry. Co.* (1), where Cockburn C.J. says, "To some extent, no doubt, they (the damages) must be matter of speculation, but that is no reason for not awarding any damages at all," and a claim for damages of a totally problematical character, but I think that the present case is well over the line. The following passage from Mayne on Damages, 8th ed., p. 11, forms, I think, a strong argument in favour of the damages in the present case being only nominal:—"The principle of all these cases seems to be that in matters of contract the damages to which a party is liable for its breach ought to be in proportion to the benefit he is to receive from its performance. Now this benefit, the consideration for his promise, is always measured by the primary and intrinsic worth of the thing to be given for it, not by the ultimate profit which the party receiving it hopes to make when he has got it . . . . The price is based on the market value of the thing sold . . . . It is obviously unfair, then, that either party should be paid for carrying out his bargain on one estimate of its value, and forced to pay for

(1) 1 Q. B. D. 274.

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Jelf J.

failing in it on quite a different estimate. This would be making him an insurer of the other party's profits without any premium for undertaking the risk."

In *Watson* v. *Ambergate, Nottingham, and Boston Ry. Co.* (1), which is commented upon in Mayne on Damages, 8th ed., p. 70, Patteson J. seemed to think that the chance of a prize might be taken into account in estimating the damages for breach of contract in sending a machine for loading barges by railway too late for a show, but Erle J. appeared to think that this damage was too remote. The case went off on another point, but I incline to think that the view of Erle J. was the correct one, as the chance of winning a prize was not, in my opinion, of sufficiently ascertainable value at the time the contract was made to be within the contemplation of the parties. Moreover, the contingencies in the present case are far more numerous and uncertain than in the case cited.

The American decisions are collected in Sedgwick on Damages, 8th ed., vol. 1, pp. 245 et seq., 277, 292—294. The principle above discussed is clearly laid down, and it is shewn that in order to be recoverable damages for loss of profit must not only naturally flow from the breach or be at the time of contract in the contemplation of both parties, but that the amount also can be ascertained with reasonable certainty.

Now in the present case, although the defendant must be taken to have known the plaintiff's general business object in making the bargain and his expectation of commercial profit in making it, I do not consider that the plaintiff's suggested damage was the reasonable and natural result of the defendant's breach, or that it could have been within the contemplation of both parties at the time of contract made according to the rule in *Hadley* v. *Baxendale* (2) and other cases of the same kind. I therefore decide this case on the ground that there is no evidence of any legal damage arising from the breach of contract, and if there had been a jury I should have so directed them.

If I had been at liberty to speculate on the chances, I might or might not have come to the same conclusion upon the facts. The price paid for the service by Cicero was 100*l.* instead of the

(1) 15 Jur. 448.

(2) (1854) 9 Ex. 341.

315*l.* which the plaintiff would have had to pay for the service of Cyllene, and the plaintiff therefore starts with 215*l.* to the good by properly diminishing the damages as best he could, and looking to all the accumulated chances which have to be taken into account as above enumerated, it is doubtful whether any tribunal would find that the plaintiff lost by having a foal of Cicero and Dear Mary, instead of a foal of Cyllene and Dear Mary, enough to overtop the initial gain, even if it were clear that the difference between the value of a foal by Cyllene and of a foal by Cicero could under all the circumstances be put as high as 215*l.* I prefer, however, not to prejudice either party on the legal question of remoteness of damage by making a pure shot or guess on a matter as to which I have in my view no legal basis of assessment to guide me.

I therefore reluctantly hold that the plaintiff is not legally entitled to judgment for at all events more than nominal damages. I give judgment, therefore, for the plaintiff for 1*s.* damages.

Costs are in my discretion. In an ordinary case in which the plaintiff recovers nothing by way of damages and has substantially failed, I should make him pay the defendant's costs, but having regard to the attitude taken up by the defendant and his agent throughout, and to the issues on which the defendant has failed, I think justice will be done by ordering each party to pay his own costs.

Judgment accordingly.

Solicitors for plaintiff: *Ravenscroft, Woodward & Co., for Purdy & Holley, Aylsham, Norfolk.*

Solicitors for defendant: *Oliver Richards & Parker.*

W. F. B

1910
May 30;
June 13.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* NORTON.

Criminal Law—Statement made in Presence of Prisoner—Admissibility of Contents—Evidence of Acknowledgment of its Truth—Direction to Jury—Misdirection—Appeal—"No substantial miscarriage of justice"—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 4, *sub-s.* 1.

The contents of a statement alleged to have been made in the presence of a prisoner cannot be given in evidence unless and until the judge has satisfied himself, from the evidence contained in the depositions or given at the trial, that there is evidence, fit to be submitted to the jury, that the prisoner by his answer to the statement, whether given in words or by conduct, acknowledged the truth of the statement.

If the contents of the statement are admissible in evidence, in accordance with the above rule, the jury should be directed that they are entitled to take the statement into consideration as evidence in the case, not because the statement is evidence of the matters contained in it, but solely because of the prisoner's acknowledgment of its truth.

Where there has been a misdirection of the jury an appeal will not be dismissed under s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, on the ground "that no substantial miscarriage of justice has actually occurred," unless the Court is satisfied that the jury, if properly directed, would, not might, have found the prisoner guilty.

Appeal against a conviction.

The prisoner was tried at the Leeds Assizes in March last before Mr. Commissioner Scrutton on a charge of carnally knowing a girl under the age of thirteen years, and was convicted. The prisoner appealed against his conviction on the ground that the Commissioner had misdirected the jury as to the effect of certain evidence as to statements made in the presence of the prisoner by the girl (who was not called as a witness) charging him with having committed the offence. On the hearing of the appeal it was admitted by counsel for the Crown that there had been a misdirection, but it was contended that, notwithstanding the misdirection, there had in the circumstances been no substantial miscarriage of justice, and that the appeal should, therefore, under s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, be dismissed.

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The facts of the case, so far as they are material to this report, are stated in the judgment.

L. G. Hoare, for the appellant.

H. T. Waddy, for the Crown.

[The following cases were referred to:—*Rex* v. *Bromhead* (1); *Rex* v. *Thompson* (2); *Rex* v. *Dyson* (3); *Rex* v. *Coleman* (4); *Rex* v. *Stoddart*. (5)]

Cur. adv. vult.

June 13. The judgment of the COURT (Lord Alverstone C.J., Pickford and Lord Coleridge JJ.) was read by

PICKFORD J. The appellant in this case was tried at the Leeds Assizes on March 17 last before Scrutton J., then sitting as a Commissioner of Assize, on a charge of carnally knowing a girl called Marjory Truman, she being then under the age of thirteen years. He was convicted and sentenced to ten years' penal servitude, and now appeals against that conviction on the ground that the learned Commissioner misdirected the jury as to the effect of certain evidence given on the trial. The evidence against the prisoner was entirely circumstantial with the exception of that relating to the statements of the girl and the answers of the prisoner to which reference is made below. The child was not called at the trial, but evidence was given of statements made by her in the presence of the prisoner and his answers to them, and it is in relation to this evidence that the question of misdirection arises.

The evidence was to the effect that, on being asked by the prisoner who had done it, she said "You," and, on being asked by another person, she said "Stevie Norton," and pointed to the prisoner; that the prisoner said "No, Madge, you are mistaken"; that then she said "You have done it, Stephen Norton," and pointed to him again. According to one witness he then lifted his arms and said "If I have done it I hope the Lord will strike me dead," and according to another witness, "If you say so I might as well put my clothes on and go home." There was,

(1) (1906) 71 J. P. 103.
(2) [1910] 1 K. B. 640.
(3) [1908] 2 K. B. 454.
(4) (1908) 72 J. P. 425.
(5) (1909) 73 J. P. 348.

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therefore, nothing in his answers necessarily amounting to an admission of the girl's statements.

The direction of the learned Commissioner as to the effect of this evidence is as follows: "One starts with that. Maggie Truman comes back from that awful night at 9 o'clock the next morning. Something is seen trying to get over the wall of that field, and Travis runs up and brings her down to her mother. The prisoner is brought into the house, and then there comes the dramatic scene, which is so dramatic that one is afraid that it takes away one's power of accurately estimating it, in which the man solemnly swears that he did nothing to the little girl, and the little girl twice or thrice points at him and says 'Stevie Norton, you did it.' Gentlemen, you must consider that remark carefully. It is for you entirely, and anything I say as to fact you are to disregard if it does not agree with your own views; you are the judges of fact, and not I; you must consider this. Do you think, first of all, that after what she had gone through that night the little girl was in a condition to accurately remember, ... but, gentlemen, at any rate the fact that the little girl did say so renders it necessary to very carefully consider what evidence is tendered on behalf of Stephen Norton." And later on the learned Commissioner says, "You have then got him telling lies as to where he was, and you will probably think, if that is the position, that confirms very much what the little girl says, because, if he were the guilty man, he would be very likely to try and explain where he was at a material time by making some statement which must have been untrue, because, if he were the guilty man, he was in the wheat field and not in some other place. Gentlemen, you have to consider all these matters and you have to consider what weight is to be attached to the statement of the little girl."

Objection was taken to this direction on the ground that it directed the jury to take into consideration the girl's statement as evidence of the facts contained in it, and to consider whether looking at all the circumstances they accepted it or the prisoner's denial; whereas they ought to have been directed that the statements were not evidence of the facts stated, and that as they were denied by the prisoner the jury should disregard them.

We are of opinion that this was a misdirection; indeed, the counsel for the Crown did not contend that it was not, but relied in support of the conviction on the proviso to s. 4 of the Criminal Appeal Act.

We think it well, however, to state the grounds of the admissibility of such statements in evidence and our reasons for considering the direction erroneous. As a general rule, statements as to the facts of a case under investigation are not evidence unless made by witnesses in the ordinary way, but to this rule there are exceptions. One is that statements made in the presence of a prisoner upon an occasion on which he might reasonably be expected to make some observation, explanation, or denial are admissible under certain circumstances. We think it is not strictly accurate, and may be misleading, to say that they are admissible in evidence against the prisoner, as such an expression may seem to imply that they are evidence of the facts stated in them and must be considered upon the footing of other evidence. Such statements are, however, never evidence of the facts stated in them; they are admissible only as introductory to, or explanatory of, the answer given to them by the person in whose presence they are made. Such answer may, of course, be given either by words or by conduct, e.g., by remaining silent on an occasion which demanded an answer.

If the answer given amount to an admission of the statements or some part of them, they or that part become relevant as shewing what facts are admitted; if the answer be not such an admission, the statements are irrelevant to the matter under consideration and should be disregarded. This seems to us to be correctly and shortly stated in Taylor on Evidence, s. 814, p. 574: "The statements only become evidence when by such acceptance he makes them his own statements."

No objection was taken in this case to the admission of the statements in evidence, but as the prisoner may be tried again on an indictment on which that question may arise, we think it well to state in what cases such statements can be given in evidence. We think that the contents of such statements should not be given in evidence unless the judge is satisfied that there is evidence fit to be submitted to the jury that the prisoner by

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his answer to them, whether given by word or conduct, acknowledged the truth of the whole or part of them. If there be no such evidence, then the contents of the statement should be excluded; if there be such evidence, then they should be admitted, and the question whether the prisoner's answer, by words or conduct, did or did not in fact amount to an acknowledgment of them left to the jury.

In trials of prisoners on indictment, in which the most numerous and important of these cases arise, there is, as a rule, no difficulty in deciding whether there be such evidence or not, as the prisoner's answer appears upon the depositions, and the chance that the evidence with regard to it may be different on the trial is so small that it may be disregarded. When, however, the evidence of the prisoner's answer does not appear, there does not seem to be any practical difficulty in applying the rule above stated. The fact of a statement having been made in the prisoner's presence may be given in evidence, but not the contents, and the question asked, what the prisoner said or did on such a statement being made. If his answer, given either by words or conduct, be such as to be evidence from which an acknowledgment may be inferred, then the contents of the statement may be given and the question of admission or not in fact left to the jury; if it be not evidence from which such an acknowledgment may be inferred, then the contents of the statement should be excluded. To allow the contents of such statements to be given before it is ascertained that there is evidence of their being acknowledged to be true must be most prejudicial to the prisoner, as, whatever directions be given to the jury, it is almost impossible for them to dismiss such evidence entirely from their minds. It is perhaps too wide to say that in no case can the statements be given in evidence when they are denied by the prisoner, as it is possible that a denial may be given under such circumstances and in such a manner as to constitute evidence from which an acknowledgment may be inferred, but, as above stated, we think they should be rejected unless there is some evidence of an acknowledgment of the truth. Where they are admitted we think the following is the proper direction to be given to the jury:—That if they

come to the conclusion that the prisoner had acknowledged the truth of the whole or any part of the facts stated they might take the statement, or so much of it as was acknowledged to be true (but no more), into consideration as evidence in the case generally, not because the statement standing alone afforded any evidence of the matter contained in it, but solely because of the prisoner's acknowledgment of its truth; but unless they found as a fact that there was such an acknowledgment they ought to disregard the statement altogether. (1)

In this case the direction above set out is not that the jury should disregard the statement, but that they should take it into consideration, and examine whether it was likely to be accurate and whether it was confirmed by the other evidence. For the reasons given above we think this was erroneous and it was a misdirection upon a point very material to the issue. It was, however, contended that the conviction might be supported under the proviso to s. 4 of the Criminal Appeal Act, which enables the Court to dismiss the appeal if they consider that no substantial miscarriage of justice has occurred. We do not think that we can come to this conclusion. The principle on which the Courts act in such cases is laid down in *Rex* v. *Stoddart* (2), i.e., in order to support the conviction we must come to the conclusion that if the jury had obeyed the direction and disregarded the girl's statement they would, not might, have come to the same conclusion. As we have pointed out, the evidence without the girl's statement was entirely circumstantial, and there were considerations in favour of both a conviction and an acquittal, and we do not think that we can say that the jury would necessarily have come to the same conclusion. We cannot either altogether put out of sight the fact that the prisoner had previously been tried on this indictment and the jury had disagreed, shewing that to some minds, at any rate, there seemed to be doubts in the case.

Conviction quashed.

Solicitor for appellant: *Registrar of the Court of Criminal Appeal.*
Solicitor for the Crown: *Director of Public Prosecutions.*

(1) See *Reg.* v. *Smith*, (1897) 18 Cox, C. C. 470. (2) 73 J. P. 348.

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June 14.

MORDAUNT BROTHERS *v.* THE BRITISH OIL AND CAKE MILLS, LIMITED.

Sale of Goods—Unascertained Goods—Delivery Orders—Unpaid Seller's Lien —Assent to Sub-sale—Sale of Goods Act, 1893 (56 *& 57 Vict. c.* 71), *s.* 47.

By s. 47 of the Sale of Goods Act, 1893, it is declared that the unpaid seller's right of lien or retention or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto :—

Held, that the mere assent of an unpaid seller to a sale by the buyer of an unascertained portion of the goods is not such an assent as is contemplated by the above section as affecting the unpaid seller's right of lien. To affect the lien the assent must be given in such circumstances as to shew an intention on the part of the unpaid seller to renounce his right against the goods sold by the buyer.

The defendants sold oil to certain merchants. The merchants sold a portion of this oil to the plaintiffs, giving them delivery orders addressed to the defendants and directing the latter to deliver to the plaintiffs or their order "ex our contract." The plaintiffs presented these orders to the defendants, who either sent word that they were in order, or retained them without comment, and in either case entered in their books the names of the plaintiffs. While the merchants were punctual in their payments to the defendants the latter regularly delivered oil on these orders to the plaintiffs or their sub-purchasers. The merchants fell into arrear with their payments, and the defendants, claiming to exercise their right of lien as unpaid sellers, refused to make any further deliveries against the merchants' delivery orders.

In an action by the plaintiffs against the defendants :—

Held, that the defendants had not assented to the sales by the merchants to the plaintiffs so as to preclude them from exercising their right of lien as unpaid sellers.

Stoveld v. *Hughes*, (1811) 14 East, 308, and *Pearson* v. *Dawson*, (1858) E. B. & E. 448, distinguished.

Trial of action before Pickford J. without a jury.

The plaintiffs were a firm of oil seed and tallow brokers. The defendants were seed crushers and oil boilers and refiners. Both parties carried on business in the city of London and both had for some time past had dealings with Messrs. Crichton Brothers, a firm of oil merchants. This firm used to buy oil from the defendants; having made a purchase, they handed to the plaintiffs a delivery order in this or a similar form: "Messrs. the British Oil and Cake Mills, Limited, Please deliver to

Messrs. Mordaunt Brothers or order two tons boiled linseed oil in pipes ex our contract. (Signed) Crichton Brothers."

The plaintiffs on receiving such a delivery order made an advance to Crichton Brothers equal to about 90 per cent. of the value of the oil named in the order. This they did in consideration of 5 per cent. on the amount advanced and of a commission if, as usually happened, they subsequently sold the oil by the order of Crichton Brothers. The plaintiffs having taken the order indorsed it with the words "Please wait our orders" or "Please deliver as per instructions herewith" and signed the indorsement, and sent the order so indorsed to the defendants, who either sent word, in answer to inquiry, that it was in order or else retained it without comment, and in either case entered the name of the plaintiffs in their books as the persons to whom or to whose order the oil was to be delivered.

Shortly after receiving the advance Crichton Brothers used to direct the plaintiffs either to sell the oil at once or to wait till it reached a certain price. The plaintiffs in these cases sent to Crichton Brothers a bought note stating the amount bought, the price, the time for delivery, the amount of their commission, and particulars connecting the oil bought with the particular delivery order or orders to which it related. On the same day on which they bought from Crichton Brothers the plaintiffs sold the oil to other persons, to whom they sent a sale note stating the quantity sold, the price, the time for delivery, and the terms of payment. In certain instances the plaintiffs themselves purchased the oil from Crichton Brothers and resold it on their own account. Having sold the oil, whether by direction of Crichton Brothers or on their own account, the plaintiffs sent directions to the defendants to deliver to the order of the purchasers, to whom they sent another delivery order.

Business proceeded on these lines for many months, Crichton Brothers making punctual payments for the oil they bought from the defendants, and the defendants regularly executing the delivery orders presented by the plaintiffs or their purchasers; but in February, 1910, Crichton Brothers having fallen into arrear with their payments to the defendants, the latter refused to deliver any further oil against Crichton Brothers' delivery

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orders and returned to the plaintiffs the unexecuted orders. These orders represented some fifty-eight tons of oil, of which forty-seven tons had been bought by the plaintiffs. The remaining eleven tons were the subject of advances by the plaintiffs up to 90 per cent. of their value. Some of the delivery orders had been in part executed, namely, to such an extent that of the total number of fifty-eight tons included in the delivery orders fourteen tons and no more had been delivered.

The plaintiffs claimed a declaration that they were entitled to delivery of the goods undelivered and to damages for non-delivery. They based this claim on two grounds—first, that the defendants were estopped from denying that they had in their hands oil to answer the delivery orders, having made representations to that effect, on the faith of which the plaintiffs purported to have altered their position by making advances to Crichton Brothers and by purchasing from that firm as aforesaid oil which the plaintiffs had subsequently sold to sub-purchasers, to whom therefore they were liable to make deliveries or to pay damages. Secondly, they contended that the defendants had by their words and conduct assented to the sale of the oil by Crichton Brothers to the plaintiffs, and that consequently by s. 47 of the Sale of Goods Act, 1893 (1), the defendants had precluded themselves from exercising an unpaid seller's right of lien or retention.

As to the first ground the learned judge held that the plaintiffs had failed to prove facts necessary or sufficient to establish a case of estoppel, as the evidence shewed that the plaintiffs regularly made the advances or purchases before making any inquiries as to whether the delivery orders would be executed, and had not therefore altered their position on the faith of any answers to such inquiries.

Upon the second point,

Bailhache, K.C., and *Holman Gregory*, for the plaintiffs. The

(1) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 47: "Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto . . . ."

acceptance of the delivery orders by the defendants was an assent by them to the sale or other disposition of the goods by Crichton Brothers to the plaintiffs such as is contemplated by s. 47 of the Sale of Goods Act, 1893, as affecting the right of lien of the plaintiffs, the unpaid sellers. That section declares the common law as laid down in *Stoveld* v. *Hughes* (1) and *Pearson* v. *Dawson*. (2) From the time when they accepted the delivery orders the defendants held the goods specified therein as agents for the plaintiffs; if any charge for warehousing had been made it would have been payable by the plaintiffs: *Stoveld* v. *Hughes*. (1) If the defendants wished to retain any lien as unpaid vendors, it was their duty to give the plaintiffs notice of their contingent claim to the goods in case Crichton Brothers made default in payment. The defendants are in the position of warehousemen. When a delivery order is handed to a warehouse keeper and he accepts it he becomes an agent for the purchaser who lodges it and cannot contest his title or claim a lien on the goods: *Pearson* v. *Dawson*. (2) This applies to the undelivered goods specified in all these delivery orders; but it applies with greater force to those specified in orders which were in part executed.

Bankes, *K.C.*, and *Inskip*, for the defendants. Mere assent to a sub-contract is not sufficient to deprive an unpaid seller of his right of lien; it may mean no more than that the unpaid seller takes note of the fact that his purchaser has sold to a third person, but that neither the purchaser nor the third person shall have delivery unless and until the unpaid seller receives his purchase-money. The acceptance of the delivery orders in this case is equivalent to the undertaking to deliver which was relied on in *Farmeloe* v. *Bain* (3) and was in these terms: "We hereby undertake to deliver to your order indorsed hereon twenty-five tons merchantable sheet zinc, off your contract of this date." That document was held to amount to no more than this: "You have a contract with me for the sale of certain zinc; and I am willing to deliver twenty-five tons off that contract, on the terms of that contract." It was there held that unpaid

(1) 14 East, 308. (2) E. B. & E. 448.

(3) (1876) 1 C. P. D. 445.

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sellers, who had handed that undertaking to their purchasers, were nevertheless entitled to exercise their lien. That was a case of unappropriated goods and is more in point than the cases of *Stoveld* v. *Hughes* (1) and *Pearson* v. *Dawson* (2) cited by the plaintiffs. Whatever may be the law in the case of specific goods, in the case of unascertained goods an assent of an unpaid seller to a sub-contract of sale must, in order to affect his right of lien, be such an assent as shews an intention on the part of the unpaid seller to renounce his right against the goods and to attorn to the sub-purchaser and hold the goods as his agent. These delivery orders are not intended to have any such effect as that; they are merely statements assented to by the defendants that the goods named in them are in possession of the defendants and will be delivered in due course provided they are paid for. In this respect they are equivalent to the wharfinger's certificates in *Gunn* v. *Bolckow, Vaughan, & Co.* (3)

Bailhache, K.C., in reply.

PICKFORD J., after dealing with the first point, continued:— It was next argued that the plaintiffs were entitled to succeed by virtue of s. 47 of the Sale of Goods Act, 1893, on the ground that the defendants had assented to the sales by Crichton Brothers to the plaintiffs. Several cases were cited in which it was held that unpaid vendors had assented to sub-sales so as to preclude themselves from asserting their right of lien. As a matter of fact all those cases related to sub-sales of specific goods. I am not, however, going to decide that s. 47 has no application to unascertained goods; but I wish to point out that such acts as presenting to an unpaid vendor delivery orders in favour of sub-purchasers and the entry accordingly of the names of the sub-purchasers in the books of the unpaid vendor may have a very different effect according as the goods are specific or unascertained. In the former case it may be more readily inferred that the unpaid vendor has assumed the position of an agent or bailee holding the goods for and on behalf of the sub-purchaser or holder of the delivery order, and

(1) 14 East, 308. (2) E. B. & E. 448.
(3) (1875) L. R. 10 Ch. 491.

the acceptance of the delivery order and entry of the holder's name in the books by the unpaid vendor might in the case of specific goods justify the inference that the unpaid vendor had accepted that position. No such inference could be drawn if the goods were not in existence, and it does not follow that because the inference may be drawn in the case of specific goods it will also be drawn in the case of goods in existence but unascertained. In my opinion the assent which affects the unpaid seller's right of lien must be such an assent as in the circumstances shews that the seller intends to renounce his rights against the goods. It is not enough to shew that the fact of a sub-contract has been brought to his notice and that he has assented to it merely in the sense of acknowledging the receipt of the information. His assent to the sub-contract in that sense would simply mean that he acknowledged the right of the purchaser under the sub-contract to have the goods subject to his own paramount right under the contract with his original purchaser to hold the goods until he is paid the purchase-money. Such an assent would imply no intention of making delivery to a sub-purchaser until payment was made under the original contract. The assent contemplated by s. 47 of the Sale of Goods Act, 1893, means something more than that; it means an assent given in such circumstances as shew that the unpaid seller intends that the sub-contract shall be carried out irrespective of the terms of the original contract.

Now in the circumstances of this case what was the effect of the inquiry by the plaintiffs whether the delivery orders of Crichton Brothers were "in order" and the defendants' reply that they were? I think some light is thrown on the nature and purpose of this inquiry by the fact that the plaintiffs parted with their money before making the inquiry. Neither party regarded those inquiries as directed to the questions whether the defendants were to hold the oil as agents for the plaintiffs, renouncing any rights they might have to hold the goods till they were paid for by Crichton Brothers, and whether they were prepared to deliver to the plaintiffs and look elsewhere than to the goods themselves for any rights they might have in respect of them. Whatever might have been the effect of such an inquiry and answer in a case where

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specific goods were in question, I think in the present case where the goods were unascertained the inquiry and answer amounted to no more than this—that the defendants were ready to carry out the contract between themselves and Crichton Brothers with this modification, that delivery should be made to the plaintiffs instead of to Crichton Brothers, but that the delivery should be subject to all the other terms and incidents of the contract with Crichton Brothers.

In two or three instances a certain portion of the goods specified in delivery orders was delivered before the defendants refused to make any further deliveries. In my opinion that makes no difference; it simply means that they were carrying out their contract with Crichton Brothers so long as that firm were punctual in their payments. In my opinion the plaintiffs' case fails and there must be judgment for the defendants.

Judgment for defendants.

Solicitors for plaintiffs: *Williamson, Hill & Co.*
Solicitors for defendants: *Stow, Preston & Lyttelton.*

W. H. G.

THAIRLWALL *v.* THE GREAT NORTHERN RAILWAY COMPANY.

1910
June 17, 18.

Company—Dividend—Payment by Dividend Warrant—Lost Warrant—Action by Shareholder—Plea of Payment—Powers of Directors—Request for Payment in particular Way—Companies Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 16), *s.* 90.

The general powers conferred upon the directors of a company by s. 90 of the Companies Clauses Consolidation Act, 1845, authorize the directors to decide within reasonable limits when and how dividends duly declared by a general meeting of the shareholders shall be paid.

The directors of a company in a half-yearly report and statement of accounts recommended the payment of a certain dividend on preference and ordinary stock, and gave notice that dividends would be paid on a certain day by means of dividend warrants sent by post to the registered address of the stockholder in each case. The shareholders of the company at their half-yearly general meeting declared the amount of dividend as proposed by the directors, but passed no resolution as to how payment should be made. On the day named in the directors' report a dividend warrant was sent by post to the registered address of a stockholder. The warrant was lost in the post:—

Held, that in the circumstances there was a request by the stockholder to the company to pay the amount due to him by means of a warrant sent by post to his registered address.

Therefore in an action by the stockholder against the company to recover the amount of dividend in respect of the stock held by him:—

Held, that the above facts supported a plea of payment by the company, and that the remedy, if any, of the stockholder was to put in suit such rights as he had upon the lost warrant.

Norman v. *Ricketts*, (1886) 3 Times L. R. 182, followed.

Appeal from the Clerkenwell County Court.

The plaintiff was the holder of certain 3 per cent. preference stock, preferred converted ordinary stock, and deferred converted ordinary stock of the defendants.

By s. 15 of the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), the terms and conditions to which any preference share or preference stock is subject shall be clearly stated on the certificate of that preference share or portion of preference stock.

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By s. 9 of the Great Northern Railway (Capital) Act, 1890 (53 & 54 Vict. c. cliii.), the terms and conditions on which any preferred converted ordinary stock or deferred converted ordinary stock of the Great Northern Railway Company is issued shall be stated on the certificate thereof. Indorsed on the certificates which the plaintiff held was a notice to the effect that dividends were payable by warrants which would be sent by post to the proprietor's registered address, or to any person duly authorized to give a receipt for the same, and requesting the proprietors of stock to give prompt notice to the company of any alteration of address, so that dividend warrants and notices might be correctly forwarded.

The plaintiff had been for some years a stockholder of the defendant company and had always received dividend warrants through the post.

On February 4, 1909, the directors issued to the stockholders, including the plaintiff, a half-yearly report and statement of accounts, stating that their profits enabled the proprietors to meet in full the interest on the preference stocks and to declare a dividend for the half-year of 2*l.* per cent. on the preferred converted ordinary stock and 1*l.* 15*s.* per cent. on the deferred converted ordinary stock. On the back of the report and statement of accounts was printed in large type a notice in the following terms:—"The dividend warrants will be payable on Tuesday, February 16, 1909, and will be sent by post to the proprietors on the previous day. Proprietors are requested to give notice, without delay, of any change of address, so that their warrants may not be mis-sent."

On February 12 the stockholders at a half-yearly general meeting passed a resolution that the dividend payable to the proprietors on the register of the company on January 18, 1909, should be and was thereby declared for the half-year ended December 31, 1908, to be at the rate of 3*l.* per cent. on the various 3 per cent. preference stocks, at the rate of 2*l.* per cent. on the preferred converted ordinary stock, and 1*l.* 15*s.* per cent. on the deferred converted ordinary stock. On February 15 a dividend warrant for the appropriate amount was sent by post directed to the registered address of the plaintiff.

This warrant was crossed generally and was in the following form:—

"Union of London & Smiths Bank, Limited,
No. 2, Princes Street, London.

"Pay to the order of
the sum of
"£

"E. H. Burrows, Secretary.

"Signature of Payee

"Note.—This warrant must be signed by the person to whom it is payable, and presented for payment through a banker. It will not be honoured after three months from date of issue unless specially indorsed by the secretary."

The warrant was lost in the post and never reached the plaintiff. It had not been presented for payment by anybody.

On February 17, 1909, the plaintiff wrote to the defendants informing them that he had received no dividend warrant. The defendants replying that the warrants had been sent, the plaintiff requested them to stop payment by the bankers, which they did on February 23. On May 19 the plaintiff wrote asking for a duplicate warrant, which the defendants by letter of May 25 agreed to give on the plaintiff signing an agreement to indemnify them against all claims and demands, moneys, losses, damages, costs and expenses. This the plaintiff refused to do.

On December 1, 1909, the plaintiff issued a plaint in the Clerkenwell County Court claiming 2*l.* 10*s.* 10*d.*, the amount of dividend (less income tax) for the half-year ending December 31, 1908, in respect of the stocks held by him in the defendant company, which sum he alleged to be due in accordance with the declaration of dividend made at the half-yearly meeting of the defendant company held on February 12, 1909, and to be payable on February 16, 1909. The case was heard on February 3, 1910.

The county court judge gave judgment for the plaintiff.

The defendants appealed.

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Simon, K.C., and *Eustace Hills*, for the appellants. The resolution of the stockholders of February 12 declaring a dividend was a direction by the stockholders to the directors to carry that resolution into effect by sending dividend warrants by post addressed to the registered addresses of the proprietors as being either the method of payment proposed in the report and statement of accounts, or the method theretofore adopted, or a reasonable method, or as the method prescribed by statute, and therefore the only way in which they were authorized to make or the stockholders were entitled to receive payment. In the case of the preference stock by the Companies Clauses Act, 1863, s. 15, and in the case of the other stocks by the Great Northern Railway Company (Capital) Act, 1890, s. 9, it is provided that the terms and conditions on which the respective stocks are held are to be stated on the certificates, and the certificates state that one of the terms and conditions is that dividends shall be payable by dividend warrant sent by post to the registered address of the stockholder. Then as soon as this dividend warrant duly filled up and signed and addressed was put into the post the appellants had discharged their duty to the respondent. They have paid the dividend just as the defendant was held to have paid the debt in the case of *Norman* v. *Ricketts*. (1) That was an action on a milliner's bill to which the defendant pleaded payment. The plaintiffs having written from London to the defendant in Suffolk, asking her to send a cheque, it was held that posting the cheque was payment, although it never reached the plaintiffs, but was stolen in the transit and cashed by the thief. The principle of that case governs the present case, and the answer to the respondent's claim for the dividends is that the appellants have paid them. Secondly, even if this were not payment, the appellants have at the request of the respondent constituted him the holder of a negotiable instrument, which being lost he may have another, but only upon the terms of giving the appellants security to indemnify them: Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 69.

Joyce Thomas, for the respondent. The mere posting by a

(1) 3 Times L. R. 182.

debtor to his creditor of a cheque for the amount of a debt is not payment of the debt, unless there has been a previous request by the creditor that payment shall be made by cheque sent through the post: *Baker* v. *Lipton* (1); in the absence of such a request the post office is not the agent of the creditor to accept payment by cheque or otherwise, and a debtor who sends his creditor a cheque by post does so at his own risk: *Pennington* v. *Crossley & Sons.* (2) There is no evidence of any request in the present case. Sect. 15 of the Companies Clauses Act, 1863, and s. 9 of the Great Northern Railway (Capital) Act, 1890, are relied on as obliging the directors to make payment by warrants sent through the post; but those enactments relate only to the terms and conditions on which the stock is issued, that is to say, terms and conditions such as are specified in ss. 13 and 14 of the Companies Clauses Act, 1863, or in the schedules to the Great Northern Railway (Capital) Act, 1890. They have nothing to do with the method by which payment of dividends is to be made. The directors had no right to indorse on the certificates the notice relied on that payment should be made by warrant sent by post. That notice is ultra vires and ineffective. Nor has the notice on the report and statement of accounts any greater force or effect. The directors are bound to pay the dividends in cash or as the stockholder shall direct. What they do is to adopt a method of payment more convenient to themselves and less secure for their creditor and impose upon him the alternative of accepting payment in that form or not at all. They have no right to do that. The fact that the stockholder may have accepted payment in this form in the past implies no agreement to do so in the future: *In re Lloyd Edwards.* (3)

Secondly, assuming that there was the equivalent of a request to pay by means of a dividend warrant sent by post, this instrument was not a dividend warrant. A dividend warrant is a cheque, i.e., an unconditional order in writing drawn on a banker payable on demand: Bills of Exchange Act, 1882, ss. 3, 73. This was not an unconditional order in writing, first, because of the notice at the foot of it, which stated that it

(1) (1899) 15 Times L. R. 435. (2) (1897) 13 Times L. R. 513.
(3) (1891) 61 L. J. (Ch.) 22.

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would not be paid unconditionally unless presented for payment within three months from the date of issue, and, secondly, because it would never be paid unless and until it was signed by the payee, which it never has been: *Bavins Junior & Sims* v. *London and South Western Bank.* (1) If this instrument was not a dividend warrant the principle of *Norman* v. *Ricketts* (2) has no application, because payment was not made as requested. It is not suggested that there was any request by the respondent that payment should be made by any other means.

Thirdly, this instrument not being a negotiable bill, the giving of it is not a defence to an action to recover the debt in respect of which it was given. If the instrument is lost the consideration may be sued on: *Rolt* v. *Watson* (3); *Wain* v. *Bailey.* (4) No one presenting this instrument now could affect the defendants in any way; it is unsigned by the payee, payment of it has been stopped, and it will not be honoured, as it has not been presented within three months from the date of issue.

Simon, K.C., in reply. There can be no doubt that the directors of a company have power to say within reasonable limits how payment of dividends shall be made. Sects. 90 and 91 of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), give them ample powers in that behalf. (5) Then have the directors prescribed how payment is to be made? It is clear that they have; they have said that payment shall be made by dividend warrant sent by post. The instruments which were sent were dividend warrants; if it is necessary that they should be cheques, they were cheques none the less because they contained the clause at the foot of them giving notice that they must be presented within three months after issue. Every cheque ought to be presented within a reasonable time after issue: Bills of Exchange Act, 1882, s. 74. The clause at the foot of these instruments only specifies what is a reasonable time within which they must be presented.

Even if the mere posting of this instrument was not payment, yet while it is outstanding the respondent cannot sue either

(1) [1900] 1 Q. B. 270.
(2) 3 Times L. R. 182.
(3) (1827) 4 Bing. 273.
(4) (1839) 10 Ad. & E. 616.
(5) These sections are set out in the judgment of Bray J., infra.

upon it or upon the consideration for which it was given without tendering a proper indemnity. *Rolt* v. *Watson* (1) is not law; it is inconsistent with *Hansard* v. *Robinson* (2) and was overruled in *Ramuz* v. *Crowe*. (3) The law on this point is now settled and declared by the Bills of Exchange Act, 1882. The instrument was a bill of exchange within the meaning of s. 3, and the respondent can only sue upon giving security to the appellants to indemnify them, which he has refused and still refuses to do.

BRAY J. This is an action to recover an amount of dividend payable on three different stocks of the Great Northern Railway Company. The defendants contend that this dividend has been paid, having been sent by post to the registered address of the plaintiff in accordance with the principle laid down in *Norman* v *Ricketts*. (4) The principle there laid down is that the parties, debtor and creditor, can agree to make and accept payment of the debt in some form other than cash, and that when the creditor asks his debtor to send the amount due by post, then if the debtor sends a cheque for the amount by post the risk of loss in transit falls on the creditor, and the posting is equivalent to payment. It is true that in the case of *Norman* v. *Ricketts* (4) the cheque sent had got into the hands of a third person and the money had been paid to that person. But I can find nothing in the report to shew that those facts entered into the consideration of the Court when giving their decision. The ground of their decision was that the creditor had agreed that the posting of the cheque should be payment, and that therefore it was payment.

The first question is whether there was any agreement by or obligation on the plaintiff to accept this dividend warrant as payment. Reliance was placed by the defendants upon a clause at the back of the certificates, differing a little in the different certificates of stock, but substantially the same, to the following effect:—"Dividends are payable by warrants, which will be sent by post to the proprietor's registered address, or to any person

(1) 4 Bing. 273.
(2) (1827) 7 B. & C. 90.
(3) (1847) 1 Ex. 167.
(4) 3 Times L. R. 182.

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duly authorized to give a receipt for the same." Now, by s. 9 of the Great Northern Railway (Capital) Act, 1890, "The terms and conditions on which any preferred converted ordinary stock or deferred converted ordinary stock is issued shall be stated on the certificate thereof." It was contended by the defendants that this clause on the back of the certificates held by the plaintiff relating to such stock was a term and condition upon which this stock was issued. The same point arises as to the preference stock, which is subject to similar provisions by virtue of s. 15 of the Companies Clauses Act, 1863. In answer to this the plaintiff contends that there is no evidence that the stocks were issued subject to the terms and conditions indorsed on the certificates, or that those are in any sense terms or conditions of the issue of stock. I feel some difficulty upon that point, and I am not prepared to decide this case upon that ground.

The next point taken by the defendants was as to what the directors and what the stockholders had done before these dividend warrants were sent. The directors had made a report and had issued to the stockholders a statement of accounts dated February 4, 1909, stating that the profits of the company enabled them to declare a dividend and setting out the rates of dividend for the half-year and the total dividend on the divided stocks. The directors put at the back of their report and statement of accounts a notice in large type in the following terms:—"The dividend warrants will be payable on Tuesday, February 16, 1909, and will be sent by post to the proprietors on the previous day. Proprietors are requested to give notice, without delay, of any change of address, so that their warrants may not be mis-sent." In other words, this notice informed the stockholders that the directors had decided that the dividends should be paid on Tuesday, February 16, and should be sent to the stockholders by post on the previous day.

The question then arises as to whether the directors had power to do that. That question depends upon ss. 90 and 91 of the Companies Clauses Consolidation Act, 1845. By s. 90 "The directors shall have the management and superintendence of the affairs of the company, and they may lawfully

exercise all the powers of the company, except as to such matters as are directed by this or the special Act to be transacted by a general meeting of the company, but all the powers so to be exercised shall be exercised in accordance with and subject to the provisions of this and the special Act; and the exercise of all such powers shall be subject also to the control and regulation of any general meeting specially convened for the purpose, but not so as to render invalid any act done by the directors prior to any resolution passed by such general meeting." Then, by s. 91, "Except as otherwise provided by the special Act, the following powers of the company, (that is to say,) the choice and removal of the directors, except as hereinbefore mentioned, and the increasing or reducing of their number where authorized by the special Act, the choice of auditors, the determination as to the remuneration of the directors, auditors, treasurer, and secretary, the determination as to the amount of money to be borrowed on mortgage, the determination as to the augmentation of capital, and the declaration of dividends, shall be exercised only at a general meeting of the company." Now I think it was within the power of the directors, who by the terms of these sections are entrusted with the management and superintendence of the affairs of the company, to fix within reasonable limits the date at which and the mode in which the dividends should be paid, subject of course to the control of a general meeting. But suppose the directors in this case had not exercised these powers; the stockholders, after this statement of accounts had been sent to them and after receiving this notice, resolved "that the dividend payable to the proprietors on the register of the company on January 18, 1909, be, and is hereby, declared for the half-year ended December 31, 1908, as follows:—" The resolution proceeds to specify the various rates of dividend to be paid. They had had a notice as to how the directors proposed to pay the dividend, no alteration was made in those proposals, and in effect the stockholders decided amongst themselves by a proper resolution that the dividend should be paid on a certain day, and in the manner proposed by the directors. That, I think, was equivalent to the request in *Norman* v.

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Ricketts. (1) After that the stockholders became entitled to payment in that way and in that way alone. Therefore, when the dividend warrants had been sent by post to the proprietors on February 15, the dividends were paid, and the stockholders had no further remedy, except upon the dividend warrants.

Now it is said that that is not so, because the documents sent were not cheques. A dividend warrant, it was said, must be a cheque, and the document sent was not a cheque, because it had this condition at the bottom of it: "It will not be honoured after three months from date of issue unless specially indorsed by the secretary." I have felt a great deal of doubt on this point because of this statement. But I incline to think that this document is an unconditional order in writing drawn on a banker and payable on demand, signed by the person giving it, requiring the person to whom it is addressed to pay on demand a sum certain in money, and is therefore a cheque within the meaning of ss. 73 and 3 of the Bills of Exchange Act, 1882. And I think it is none the less a cheque because of that statement at the bottom of the document. I do not regard that statement as making the order conditional. It is unnecessary to say more than this; for whether it be a cheque or not, in my opinion it was a document, which it was contemplated that the stockholders should receive. The stockholder was to receive a dividend warrant. No point was taken in the Court below that this was not an ordinary dividend warrant, and the learned county court judge described it as a dividend warrant. If the point had been taken I am sure it would have been proved without difficulty that this was an ordinary dividend warrant. I base my decision on this point on the ground that the only obligation on the company was to pay by means of a dividend warrant, that they sent this document, which was such a warrant, and that the warrant having been sent the company were discharged. It is unnecessary for me to say what are the remedies of the plaintiff. If the document is a cheque, as I think it is, he is entitled under s. 69 of the Bills of Exchange Act, 1882, to obtain from the company another document of the same tenor, but only on giving security to the company to indemnify them

(1) 3 Times L. R. 182.

against all persons whatever in case the warrant alleged to have been lost shall be found again; or he may bring an action on the warrant. For the decision of the present case it is enough to say that, under the circumstances which existed, the only obligation on the company was to send the plaintiff a dividend warrant, that they did send such a warrant, and so became discharged. The appeal will be allowed.

LORD COLERIDGE J. I agree. At common law an indorsee or holder of a bill could not, if the bill were lost, recover against the acceptor, because it was a condition of payment of a bill that the holder should deliver up the bill to the acceptor for his security. But he could recover in a Court of Equity upon offering a proper indemnity: *Hansard* v. *Robinson* (1); *Ramuz* v. *Crowe*. (2) This difficulty under which a plaintiff suffered at common law, who, having been the holder of a bill, had lost it, existed only in the case of instruments which were negotiable; thus a plaintiff suing on a promissory note payable to him alone and not to order or bearer could recover in an action at law even though the note were lost: *Wain* v. *Bailey* (3); and apparently he could recover without offering any indemnity. Now, however, the rights of a plaintiff suing upon a lost bill, note, or cheque have been declared by the Bills of Exchange Act, 1882. By s. 69 of that Act, where a bill (as defined by s. 3) has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer if required to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again; and by s. 70, in any action or proceeding upon a bill, the Court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the Court or judge against the claims of any other person upon the instrument in question.

It was argued that this dividend warrant was not a bill of exchange within the meaning of the Act because it was not "an unconditional order in writing" within s. 3; and it is said

(1) 7 B. & C. 90. (2) 1 Ex. 167.
(3) 10 Ad. & E. 616.

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that it was not an unconditional order in writing because of the words at the foot of it stating that it would not be honoured after three months from the date of issue unless specially indorsed by the secretary. In my opinion those words have not the effect claimed for them of making the warrant other than an unconditional order for payment. I regard them merely as a definition by the directors acting under the authority of the stockholders as to what shall be a reasonable time within which the warrant must be presented, having regard to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case. A cheque is none the less a bill of exchange within the Act because by s. 74 the drawer may be discharged if the cheque is not presented within a reasonable time, regard being had to the same considerations. These warrants are not made less unconditional than other cheques by having these words at the foot of them, which merely give notice that the directors have fixed three months as the reasonable time within which the warrants must be presented, and after which if the warrants have not been presented inquiries will have to be made before the holder receives payment.

The real question is whether the posting of the warrant was payment of the amount of the dividend. To establish that it was, the defendants must prove a request by the plaintiff or an agreement between the plaintiff and defendants that payment should be made by means of a warrant posted to the plaintiff. If such a request or agreement is proved, then payment is established by posting even although the instrument is lost in the post: *Norman* v. *Ricketts*. (1) In the present case the stock certificates held by the plaintiff had indorsed upon them a notice that the dividends were payable by warrant sent by post to the proprietor's registered address. A question was raised whether s. 9 of the Great Northern Railway (Capital) Act, 1890, authorized the indorsement of that notice. That enactment provides that the terms and conditions on which preferred converted ordinary stock and deferred converted ordinary stock is issued shall be stated on the certificate thereof. Whether it authorizes the indorsement of this notice is perhaps a little doubtful, but it is not

(1) 3 Times L. R. 182.

necessary to decide that point, because the dividends were declared and the dividend warrants sent in pursuance of a resolution of the stockholders and in accordance with the notice indorsed upon the certificates, and that constitutes an agreement between the company and its stockholders that payment shall be made in accordance with the notice indorsed upon the certificates. Then by s. 90 of the Companies Clauses Consolidation Act, 1845, the directors have the management and superintendence of the affairs of the company and may lawfully exercise all the powers of the company with certain exceptions not affecting this case. That implies a request by each stockholder that the directors shall so act. Is it within the powers so defined that the directors should declare that payment of dividends shall be made by posting warrants to the shareholder's registered address? That question can only be answered in the affirmative. When a dividend was declared by resolution of the shareholders, that of itself authorized the directors to prescribe the mode, date, and conditions of payment, and so far from their having no authority to make payment according to the notice indorsed upon the certificates it is very doubtful whether they could have made it in any other way.

If, as I think, this is the true view, it is unnecessary to consider the position of the parties in the light of s. 69 of the Bills of Exchange Act, 1882; I would only add that I incline to the views which my brother Bray has expressed with regard to the contentions raised upon this part of the case.

Appeal allowed.

Solicitor for appellants: *R. Hill Dawe.*
Solicitors for respondent: *Thairlwall & Son.*

W. H. G.

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June 22.

REEVE *v.* JENNINGS.

Contract—Statute of Frauds, s. 4—Agreement "not to be performed within the space of one year from the making thereof"—Possible Performance by One Party within the Year—Intention.

On April 11, 1908, the defendant entered the service of the plaintiff, a dairyman, upon the terms of a verbal agreement of that date which provided that the employment of the defendant might be determined by either party giving to the other one week's notice, and that the defendant should not within thirty-six months after quitting the plaintiff's service carry on the business of a dairyman within a certain specified area. The defendant quitted the plaintiff's service on February 6, 1910, and within thirty-six months started a dairyman's business within the prohibited area. In an action by the plaintiff claiming an injunction:—

Held, that the agreement was one that was "not to be performed within the space of one year from the making thereof" within s. 4 of the Statute of Frauds, and that, the agreement not being in writing, the action was not maintainable.

Donellan v. *Read*, (1832) 3 B. & Ad. 899, and *Smith* v. *Neale*, (1857) 2 C. B. (N.S.) 67, distinguished.

Appeal from the Edmonton County Court.

The plaintiff was a dairyman carrying on business at Tottenham. On March 20, 1905, the defendant entered the plaintiff's service and signed a written agreement (wherein the defendant was referred to as "the employé") of which the material clauses were as follows:—

"1. The said Arthur Reeve shall employ the employé as a general servant in his trade or business of a dairyman upon the terms conditions, restrictions and engagements hereinafter contained and the employé shall serve the said Arthur Reeve in such capacity in his said business from the date hereof until this agreement is determined as hereunder provided.

"2. The employé shall receive as wages for his services the sum of twenty-two (*sic*) per week payable on the Saturday in each week.

"4. The employé shall not within the space of thirty-six calendar months after quitting or being discharged from the service of the said Arthur Reeve commence, carry on, or be

concerned or interested in any way whatsoever either directly or indirectly on his own or any other person's behalf in the business of a dairyman or any business of a similar character within a radius of four miles as the crow flies from that now carried on by the said Arthur Reeve, and the employé shall not within the like space of thirty-six calendar months after quitting or being discharged as aforesaid sell or supply milk to or solicit the custom of any person or persons to whom the said Arthur Reeve shall have supplied milk during the period of the said employé's service.

"7. This agreement may be determined by either party giving the other one week's notice in writing to terminate on a Saturday."

The defendant continued in the plaintiff's service until July 21, 1906, when the plaintiff discharged him. On April 11, 1908, it was verbally agreed between the plaintiff and the defendant that the defendant should re-enter the service of the plaintiff upon the terms and conditions contained in the written agreement of March 20, 1905, save that the defendant's wages were to be 24*s.* a week. The defendant remained in the plaintiff's service from April 11, 1908, until February 6, 1910, when he left and started the business of a dairyman on his own account within four miles from the plaintiff's place of business.

In this action the plaintiff claimed an injunction to restrain the defendant from committing breaches of the agreement of April 11, 1908. On behalf of the defendant it was contended that the agreement was one that was "not to be performed within the space of one year from the making thereof" within s. 4 of the Statute of Frauds, and that, the agreement not being in writing, the action could not be maintained.

The county court judge held, on the authority of *Smith* v. *Neale* (1), that as the consideration on the plaintiff's part could have been performed within the twelve months, and the whole consideration of the contract was performed by the plaintiff, s. 4 of the Statute of Frauds did not apply to the contract, and he gave judgment for the plaintiff for the injunction asked for. The defendant appealed.

(1) 2 C. B. (N.S.) 67.

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G. W. H. Jones, for the defendant. *Smith* v. *Neale* (1), the case on which the county court judge based his decision, is distinguishable, for in that case all that was to be done by the plaintiff, constituting one entire consideration for the defendant's promise, was capable of being and was in fact performed within the year. In the present case the defendant clearly could not perform his part of the contract within the year, and although it was possible for the plaintiff to do so, for he might have determined the defendant's service within that period, yet it cannot be gathered from the terms of the contract that it was the intention of the parties that he should do so, the contract of employment being for an indefinite period. The consideration on the plaintiff's part was, therefore, a continuing consideration, and not of necessity to be performed within the year. The Court in deciding *Smith* v. *Neale* (1) followed *Donellan* v. *Read* (2), which also was a case where there was an entire consideration on one side which was capable of being, and which was in fact, performed within the year. Although it is now probably too late to question the correctness of the decisions in *Smith* v. *Neale* (1) and *Donellan* v. *Read* (2), still they should only be regarded as authorities for cases in which the facts are the same: see Smith's Leading Cases, 11th ed. at pp. 318, 319. In *McGregor* v. *McGregor* (3) Lord Esher M.R. said that the true doctrine on this subject is that which was laid down by Tindal C.J. in *Souch* v. *Strawbridge* (4), namely, that the language of the statute points to "contracts the complete performance of which is of necessity extended beyond the space of a year." In the present case the contract could not be completely performed until a period of thirty-six months had elapsed after the defendant had left the plaintiff's service. The contract is, therefore, within the statute. [He also referred to *Davey* v. *Shannon*. (5)]

[LORD COLERIDGE J. referred to *Lavalette* v. *Riches*. (6)]

Barrington-Ward, for the plaintiff. The Statute of Frauds is a very technical enactment, and its language has always been very strictly construed, the tendency being to exclude cases from

(1) 2 C. B. (N.S.) 67.
(2) 3 B. & Ad. 899.
(3) (1888) 21 Q. B. D. 424.
(4) (1846) 2 C. B. 808.
(5) (1879) 4 Ex. D. 81.
(6) (1908) 24 Times L. R. 336.

the operation of the statute rather than to bring them within it. The principle is correctly stated in Leake on Contracts, 5th ed. at p. 170, as follows: "Contracts which may be performed within the year on one side only, though they cannot be performed within the year on the other side, are not within the statute." The authorities given for that proposition are *Cherry* v. *Heming* (1), where the Court approved of *Donellan* v. *Read* (2), and *Miles* v. *New Zealand Alford Estate Co.* (3), in which case Bowen L.J. said that "an agreement which is to be performed on one side within the year does not require to be in writing under the statute." The words "is to be performed" mean "is capable of being performed." All the text-writers support the view taken by the county court judge: see Anson on Contracts, 12th ed., p. 79; Roscoe's Nisi Prius, 18th ed., p. 526; Broom's Common Law, 9th ed., p. 392; Chitty on Contracts, 15th ed., p. 84. The contract in this case was capable of being performed by the plaintiff within the year. It is immaterial to consider whether the parties contemplated at the time of making the contract that the defendant's service would continue beyond the year. The Court can only consider the terms of the contract, which were that the employment could be determined at any time by a week's notice on either side, and as those terms shew that the contract could be performed by one party within the year, then according to the authorities it is not within the statute. [He also cited *Bracegirdle* v. *Heald* (4), *Knowlman* v. *Bluett* (5), and *Murphy* v. *Sullivan.* (6)]

Jones in reply.

BRAY J. I cannot say that this case is free from difficulty, and it certainly is a most remarkable thing that a point should at the present time arise as to the construction of the Statute of Frauds, which apparently has never in terms been decided during the 200 years which have elapsed since the passing of the statute.

(1) (1849) 4 Ex. 631.
(2) 3 B. & Ad. 899.
(3) (1886) 32 Ch. D. 266, at p. 296.
(4) (1818) 1 B. & Ald. 722.
(5) (1874) L. R. 9 Ex. 1, 307.
(6) (1866) 11 Ir. Jur. (N.S.) 111.

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The facts are as follows: The plaintiff, who is a dairyman, took the defendant into his service on March 20, 1905, under a written agreement. That employment was terminated in 1906. On April 11, 1908, the defendant again entered the plaintiff's service, and the county court judge has found as a fact that it was verbally agreed between the parties that the defendant should be employed on the same terms as those of the written agreement of March 20, 1905. The defendant continued in the plaintiff's service until February, 1910, when he left and started a business on his own account, which admittedly would be a contravention of clause 4 of the written agreement. The question which we have to decide is whether the verbal agreement of April 11, 1908, is an agreement which was not to be performed within one year from the making thereof within s. 4 of the Statute of Frauds; and, inasmuch as the verbal agreement only confirmed the written agreement and applied it to the defendant's employment, we have only to look at the written agreement in order to ascertain the terms of the verbal agreement. [The learned judge read the clauses of the agreement of March 20, 1905, set out above, and continued:—] It is quite clear that so far as the defendant is concerned he could not, unless he died, perform his obligations under the agreement within a year, and prima facie, therefore, the agreement would come within s. 4 of the Statute of Frauds, which says: "No action shall be brought whereby . . . . to charge any person . . . . upon any agreement that is not to be performed within the space of one year from the making thereof." The section has been judicially interpreted in a great number of cases, and we have, therefore, only to consider what those decisions have determined to be the true construction of the language of the statute. I will first refer to the judgment of Lord Esher M.R. in *McGregor* v. *McGregor* (1), where, quoting a passage from the judgment of Tindal C.J. in *Souch* v. *Strawbridge* (2), he said: "I think the true doctrine on the subject is that which was laid down by Tindal C.J. in *Souch* v. *Strawbridge* (2), where he said:—'It (the statute) speaks of "any agreement that is not to be performed within the space of one year from the making thereof," pointing to contracts the

(1) 21 Q. B. D. at p. 429. (2) 2 C. B. 808.

complete performance of which is of necessity extended beyond the space of one year. That appears clearly from the case of *Boydell* v. *Drummond* (1), the rule to be extracted from which is that, where the agreement distinctly shews, upon the face of it, that the parties contemplated its performance to extend over a greater space than one year, the case is within the statute; but where the contract is such that the whole may be performed within a year, and there is no express stipulation to the contrary, the statute does not apply.'"

Applying that definition, I should hold that the present case was clearly one in which the complete performance of the agreement was of necessity extended beyond the year, because of the clause prohibiting the defendant from trading within the prescribed area for a period of thirty-six months; but an exception has undoubtedly been grafted on to that rule in a series of cases beginning with *Donellan* v. *Read* (2), a case to which it was not material to refer in *McGregor* v. *McGregor*. (3) That was a case where the landlord brought an action for rent. He had demised certain premises to a tenant for a term of years, of which eleven years were still to run. The agreement which was the subject of the action was one by which the landlord was to make certain improvements to the premises, and in consideration therefor the tenant agreed to pay him 5*l*. a year in addition to his other rent. So far as the tenant was concerned, that was an obligation which would exist for more than one year; but the Court held that the obligation on the plaintiff was one which was intended by the parties to be performed within the year. Littledale J., in delivering the judgment of the Court in that case, said (4): "As to the contract not being to be performed within a year, we think that as the contract was entirely executed on one side within a year, and as it was the intention of the parties, founded on a reasonable expectation, that it should be so, the Statute of Frauds does not extend to such a case." So that limits the exception to a case where it was the intention of the parties that it should be performed on one side within the year. There was no such intention in the present case; it was the

(1) (1809) 11 East, 142.
(2) 3 B. & Ad. 899.
(3) 21 Q. B. D. 424.
(4) 3 B. & Ad. at p. 906.

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intention of the parties that the agreement should continue in force until notice to terminate it was given. It was contemplated that it might go on in full force for several years. I treat the case of *Donellan* v. *Read* (1) as an exception to the rule, and in my opinion this case does not come within it.

The next case, *Smith* v. *Neale* (2), was one where the plaintiff agreed to assign to the defendant certain patents, and the defendant was to do something which was not to be performed within the year, so the performance of the agreement could necessarily not take place within the year. The judgment of the Court was given by Willes J. He said: "With reference to the first point, we think it may be disposed of, either by reference to the terms of the agreement, by which all that was to be done by the plaintiff constituting one *entire* consideration for the defendant's promise was capable of being performed within a year, and that it does not appear from its terms, which were undoubtedly agreed to in part, that any part of what the plaintiff was to do constituting such consideration was intended to be postponed until after a year from the time of making the agreement; so that *Donellan* v. *Read* (1) and the judgment of Lord Wensleydale in *Cherry* v. *Heming* (3) are authorities in favour of the plaintiff." It appears to me that that case does not carry the matter any further than the decision in *Donellan* v. *Read*. (1) There have been many cases in which these decisions have been referred to. Bowen L.J. in *Miles* v. *New Zealand Alford Estate Co.* (4) said: "It was indeed suggested that the Statute of Frauds applied in this case, and that the agreement, not being one which was to be performed within a year, ought to be in writing, or else it was void. The answer to that is that an agreement which is to be performed on one side within the year does not require to be in writing under the statute." I interpret the words "which is to be performed" to mean "which is by the agreement intended to be performed." The language of Bowen L.J., thus interpreted, confirms the interpretation I have placed upon *Donellan* v. *Read*. (1) I will not refer to the text-books to which reference has been made. I will, however, refer

(1) 3 B. & Ad. 899.
(2) 2 C. B. (N.S.) 67.
(3) 4 Ex. 631.
(4) 32 Ch. D. at p. 296.

to a passage in the judgment of Parke B. in *Cherry* v. *Heming* (1), where he said: "With respect to the question whether this is an instrument within the Statute of Frauds, I think that *Donellan* v. *Read* (2) is an answer; and in my opinion that case was rightly decided. The question turns upon the construction of the words 'not to be performed'; and in *Donellan* v. *Read* (2) the Court considered that those words meant not to be performed *on either side*, and did not include cases where the contract was performed on the one side." Now that opinion undoubtedly did extend the rule, but it was only a dictum, and I cannot find any case decided upon it. In my opinion, therefore, I must hold that this contract was within the statute. As regards one side it was clearly not to be performed within the year; as regards the other side it could be, but it was not the intention of the parties that it should be, performed within the year. I think that this case does not come within the exception laid down in *Donellan* v. *Read* (2), and the appeal must, therefore, be allowed.

LORD COLERIDGE J. I agree. The Statute of Frauds has been much buffeted about by decisions, but its life is not quite extinct, and it is, in my opinion, sufficiently alive to apply to this case. A contract which cannot be performed on either side within the year is admittedly within the statute; but the authorities shew that if it is contemplated by the parties that the performance on one side shall take place within the year, then the statute does not apply. It has, however, been much disputed whether the statute applies to a case where the contract has in fact been performed on one side within the year, and there are decisions and dicta on that disputable point which are at variance. I find in the judgment of Parke B. in *Cherry* v. *Heming* (3) a statement, which is merely an obiter dictum, that in those circumstances the case is taken out of the statute; and in *Knowlman* v. *Bluett* (4) there is a distinct expression of opinion by Blackburn J. that the statute does not apply where the consideration is executed, and he refers to the judgment of Tindal C.J. in *Souch* v. *Strawbridge* (5) as an

(1) 4 Ex. at p. 635.
(2) 3 B. & Ad. 899.
(3) 4 Ex. 631.
(4) L. R. 9 Ex. 1.
(5) 2 C. B. 808.

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authority for that view. I prefer to rely on the decision of Abbott J. in *Bracegirdle* v. *Heald* (1), where he said: "The case put in argument, of an agreement for goods to be delivered by one party in six months, and to be paid for in eighteen months, being after more than a year has elapsed, is distinguishable on this ground, that there, all that is on one side to be performed, viz. the delivery of the goods, is to be done within a year; whereas here, the service, which is the thing to be performed by the plaintiff, cannot possibly be completed within that period." That language was in substance repeated by Bowen L.J. in *Miles* v. *New Zealand Alford Estate Co.* (2), where he said that "an agreement which is to be performed on one side within the year does not require to be in writing under the statute." But we are asked to say in this case that, merely because the contract was capable of being performed on one side within the year, it is not within the statute. Until the Courts have come to a clearer conclusion on that point, I prefer to adhere to the view that the statute means what it says.

Appeal allowed.

Solicitors for plaintiff: *W. T. Ricketts & Son.*
Solicitors for defendant: *Windsor & Co.*

(1) 1 B. & Ald. 722, at p. 727. (2) 32 Ch. D. at p. 296.

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
1910
June 13, 23.

HUMPHRIES *v.* HUMPHRIES.

Estoppel—Res Judicata—Landlord and Tenant—Agreement for Lease—Action for Rent—Defence, no concluded Agreement—Second Action—Defence, Statute of Frauds.

The plaintiff brought an action for arrears of rent alleged to be due under an agreement for a lease. The defendant relied on the defence that no agreement had been concluded, but did not raise any defence under s. 4 of the Statute of Frauds. Judgment was given for the plaintiff.

Further arrears of rent having accrued due, the plaintiff brought a second action. In this action the defendant raised the defence that there was no memorandum or note in writing of the agreement for the lease sufficient to satisfy the requirements of s. 4 of the Statute of Frauds:—

Held, that the defendant, not having raised this defence in the former action, was precluded from raising it in the second action.

Decision of the Divisional Court, [1910] 1 K. B. 796, affirmed.

Appeal from a decision of a Divisional Court (Phillimore and Bucknill JJ.). (1)

Elizabeth Humphries, the plaintiff, was the owner of a dwelling-house and appurtenances known as Providence House and situate in Toll End Road, Tipton, in the county of Stafford. In August, 1907, she entered into negotiations with the defendant with a view to the latter taking a lease of the house and premises. On the defendant's instructions a draft agreement was prepared containing certain terms agreed upon between the parties. On October 29, 1907, a stamped document was handed by the defendant to the plaintiff which was alleged by the plaintiff to constitute an agreement by the defendant to take a lease of the house and premises for a term of fourteen years at a yearly rental of 36*l.* payable quarterly. The defendant, on the footing that no agreement had ever been concluded between the parties, abstained from entering into possession of the house and premises.

On July 16, 1908, the plaintiff issued a plaint in the Dudley County Court claiming the sum of 21*l.* 13*s.* alleged to be due for

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the rent of the house and premises under an agreement for a lease dated October 29, 1907. The claim was as to 18*l.* for half a year's rent from December 25, 1907, to June 24, 1908, and as to 3*l.* 13*s.* for rent due on December 25, 1907. The defendant denied the existence of any concluded agreement for a lease. He did not either by notice before the hearing or by argument at the hearing raise any defence under s. 4 of the Statute of Frauds. The case was heard before the deputy county court judge, who held that the parties had come to an agreement, which, although only partly incorporated in the draft agreement, was fully known to and accepted by the defendant, and that, knowing the terms of that agreement, the defendant had agreed to accept without reservation the tenancy by the document of October 29, 1907. He accordingly gave judgment for the plaintiff for the amount claimed. The defendant appealed from that judgment, but the appeal was dismissed on the ground that the findings of the deputy county court judge were findings of fact which were supported by the evidence. The defendant subsequently paid the amount due under this judgment.

Rent again fell due which the defendant did not pay. On March 25, 1909, three quarters' rent at 9*l.* a quarter being due and unpaid, the plaintiff brought a second action in the Dudley County Court. In this second action, the particulars of claim being mutatis mutandis the same as those in the first action, the defendant gave notice of a special defence alleging that there was no memorandum or note in writing of the agreement for a lease sufficient to satisfy s. 4 of the Statute of Frauds. The case came on for hearing before the county court judge, who held the true inference from the documents and facts before him to be that the deputy judge had decided on the former hearing that the agreement for a lease dated October 29, 1907, mentioned in the particulars of claim was a valid and binding agreement; he therefore held that the matter was res judicata, and gave judgment for the plaintiff for the amount claimed.

The defendant appealed to the Divisional Court, and Phillimore and Bucknill JJ. dismissed the appeal. From this decision the defendant appealed to the Court of Appeal. The appeal was heard on June 13.

Maddocks, for the appellant. The issue in the present action is whether there was any memorandum in writing of the agreement of October 29, 1907, sufficient to satisfy the requirements of s. 4 of the Statute of Frauds. That issue was not raised or adjudicated upon at the trial of the first action. The issue never having been raised, the matter is not res judicata: *Hunter* v. *Stewart* (1); *Caird* v. *Moss*. (2) The defendant now must admit that there was an agreement; he is precluded by the judgment in the first action from denying that, but he is entitled to raise the issue whether, as it is not in writing, it is an enforceable agreement. In *Carter* v. *James* (3) the question of an usurious agreement was allowed to be raised in a second action though it was not raised in the first. An issue not before the Court in the first action can be raised in a second action: *Heath* v. *Overseers, &c., of Weaverham*. (4)

The omission by a defendant to set up a defence in an earlier action does not estop him from setting it up in a later action brought by the same plaintiff provided such defence is not inconsistent with any traversable averment made by the plaintiff in the earlier action: *Howlett* v. *Tarte* (5); *Irish Land Commission* v. *Ryan* (6), where all the cases on this point seem to be collected. True, judgment went by default in those cases in the first instance, but that makes no difference: *In re South American and Mexican Co., Ex parte Bank of England*. (7)

On a question of estoppel like the present, the pleadings must be taken into consideration: *Robinson* v. *Duleep Singh* (8); and there were no pleadings in this action. If the record is referred to, merely a judgment for rent due is recorded; no issue of the Statute of Frauds is referred to. In *Brunning* v. *Odhams Brothers, Ld.* (9) the defendant was held not to be barred from raising the Statute of Frauds as a defence by the fact that he had not pleaded it in the first instance, and the appellant ought not to be estopped from raising this defence now. It is a question

(1) (1861) 4 D. F. & J. 168.
(2) (1886) 33 Ch. D. 22.
(3) (1844) 13 M. & W. 137.
(4) [1894] 2 Q. B. 108.
(5) (1861) 10 C. B. (N.S.) 813.
(6) [1900] 2 I. R. 565.
(7) [1895] 1 Ch. 37.
(8) (1879) 11 Ch. D. 798, 813.
(9) (1896) 75 L. T. 602.

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of procedure only: *Leroux* v. *Brown* (1); and if this plea is not allowed it amounts to a repeal of the Statute of Frauds and is a grave injustice.

Joy, for the respondent. It was not necessary, before the Judicature Rules, to plead the Statute of Frauds: *Buttemere* v. *Hayes*. (2) The plaintiff here says there is an agreement which can be enforced; that was an issue traversable by the defendant either on the ground that no such agreement existed or that not being in writing it was not enforceable; the defendant, having failed to traverse this issue properly in the first action, is estopped from doing so in the second. *In re Hilton* (3) and *Shoe Machinery Co.* v. *Cutlan* (4) are instances. [He also cited *Henderson* v. *Henderson*. (5)] *Howlett* v. *Tarte* (6) and *Irish Land Commission* v. *Ryan* (7) are distinguishable: in both cases the earlier judgment was a judgment by default. Here the issue before the county court on the former hearing was the existence of an enforceable agreement for a lease. That issue was found in favour of the plaintiff. That being so, the judgment of Blackburn J. in *Jewsbury* v. *Mummery* (8) is conclusive. The doctrine of res judicata applies to all matters which existed at the time of the giving of the judgment, which the party had an opportunity of bringing into Court.

Maddocks, in reply, cited *Sanders* v. *Coward*. (9)

Cur. adv. vult.

June 23. The judgment of the COURT (Cozens-Hardy M.R., Farwell L.J., and Kennedy L.J.) was delivered by

FARWELL L.J. We are of opinion that the decision of the Divisional Court, affirming the county court judge, was right.

The law on this subject is thus stated by Williams J. in *Howlett* v. *Tarte* (10): "If the defendant" (to a second action) "attempted to put on record a plea which was inconsistent with any traversable allegation in the former declaration" (i.e., in the

(1) (1852) 12 C. B. 801.
(2) (1839) 5 M. & W. 456.
(3) (1892) 67 L. T. 594.
(4) (1896) 13 Rep. Pat. Cas. 141.
(5) (1843) 3 Hare, 100.
(6) 10 C. B. (N.S.) 813.
(7) [1900] 2 I. R. 565.
(8) (1872) L. R. 8 C. P. 56.
(9) (1846) 15 M. & W. 48.
(10) 10 C. B. (N.S.) 813, at p. 826.

first action) "there would be an estoppel." The first action in the present case was for rent due on June 24, 1908, of a dwelling-house known as Providence House, Toll End Road, Tipton, under an agreement for a lease dated October 29, 1907. The second action was for rent due on March 25, 1909, for the same premises under the same agreement. Each action, therefore, raised two issues of fact, (1.) the existence of the specified agreement for a lease, and (2.) the amount due for rent thereunder on the specified dates. The allegation of the existence of the agreement raises the issue which the plaintiff has to prove, namely, the existence of that specific agreement as an agreement binding and valid at law, i.e., complying amongst other things with the requirements of the Statute of Frauds.

This is the issue that was raised by the plaintiff and was traversable by the defendant, and such an issue is not the less traversable because the defendant fails to traverse either wholly or in part, whether such failure arises from neglect to comply with rules of Court requiring notice of reliance on the statute to be given or from omission properly to argue a point—e.g., that the documents tendered in evidence omitted a material provision required by the statute.

It is clear that this was the fact to be alleged by the plaintiff under the old law. A bill for specific performance of a contract for the sale of land was demurrable if it omitted to state that the contract was in writing; and at common law, as it stood in 1842, a plea of the statute was demurrable on the ground that it was a mere argumentative denial of the contract (*Leaf* v. *Tuton* (1)), the general issue being "itself a denial that the requisites of the Statute of Frauds had been complied with"; the abolition of demurrers is a mere matter of pleading which does not affect the principle. The rule laid down in *Howlett* v. *Tarte* (2) is confined to allegations which the defendant could have traversed, and does not extend to pleas which confessed and avoided, or to matters which were not raisable by traverse but by special plea, necessitating proof on the part of the defendant, such as fraud, gaming, release, or infancy, allegations which do not amount to denial, but to

(1) (1842) 10 M. & W. 393. (2) 10 C. B. (N.S.) 813.

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confession and avoidance of the contract: *Leaf* v. *Tuton*. (1) It is, we think, clear that Williams J. in *Howlett* v. *Tarte* (2) intended his question (3) to be answered as counsel answered it, in the negative; it was as follows: "Suppose a defendant in an action for an instalment due on a bond, set up a release or coverture, and issue taken upon it, and found against the defendant, the doctrine of estoppel would prevent that defence being set up in an action for a second instalment. But suppose the defendant neglected to set up the defence in the first action, would she be precluded from relying on it in the second action?" Counsel answered "Clearly not." This is in accordance with justice, for while "interest reipublicæ" that litigation should cease so far as the matters directly adjudicated upon are concerned, it is not expedient that litigants should be deprived of independent defences through oversight, when the matter can again be properly raised in Court. It is argued that the decision of the Divisional Court is in contravention of the Statute of Frauds; but estoppel is merely a rule of evidence, and if the plaintiff can object to the reception of evidence on a particular fact because it is an issue which was properly raised by him and was or could have been traversed by the defendant in a former action, and has been determined in the plaintiff's favour in such action, there is no reason for disallowing the objection; but if there was no such definite issue, then the objection will fail.

In re Hilton (4) and *Shoe Machinery Co.* v. *Cutlan* (5) are instances of cases where the issues raised by the plaintiff were traversable and the objection prevailed. *Irish Land Commission* v. *Ryan* (6) is a case where there was no issue raised with sufficient precision to operate as an estoppel: in the first action judgment went by default and the only estoppel was that the sum of 9*l*. 11*s*. rent-charge for which judgment had been given was properly recovered: it was attempted to estop the defendant from setting up in a second action, which sought to recover the rent-charge against certain lands, the defence that such lands were not liable, because the allegation admitted by

(1) 10 M. & W. 393.
(2) 10 C. B. (N.S.) 813.
(3) Ibid. at p. 821.
(4) 67 L. T. 594.
(5) 13 Rep. Pat. Cas. at p. 145.
(6) [1900] 2 I. R. 565.

default in the first action was that the rent-charge therein recovered issued out of "certain lands in the parish of Glenksin"; but it was clear that such an allegation lacked the precision necessary to create an estoppel in respect of any particular parcel of land. The application of the ordinary rules of evidence to cases arising under the Statute of Frauds is not any greater interference with the statute than the application of Order XIX., r. 15; nor is such application otherwise than in accordance with the true meaning of the Act, which is to prevent fraud and perjury. It may well be expedient to avoid the risk of fraud and perjury when there is no written evidence of a contract relating to land, by refusing to allow any evidence of such a contract to be given; but where the evidence has actually been taken and the contract has been proved by parol to the satisfaction of the Court, the reason for refusing it has disappeared, and a refusal to allow the contract to be sued upon would be an encouragement to dishonesty without any corresponding advantage to the public.

The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *T. D. Jones & Co., for J. & L. Clark, West Bromwich; Murr, Rusby & Archer, for Sharp & Darby, Dudley.*

W. C. D.

C. A
1910
July 5.

[IN THE COURT OF APPEAL.]

YATES *v.* SOUTH KIRKBY, &c. COLLIERIES, LIMITED.

Employer and Workman—Compensation—Earning Capacity of Workman—Accident—Nervous Shock—Neurasthenia—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

A nervous shock caused by the excitement and alarm resulting from a fatal accident to a fellow workman while engaged in the employment:—

Held, to be a case of "personal injury by accident arising out of and in the course of the employment" within the Workmen's Compensation Act, 1906.

Nervous shock causing incapacity to work is as much "personal injury by accident" as a broken limb or other physical injury.

Appeal against the award of the judge of the county court of Pontefract sitting as arbitrator under the Workmen's Compensation Act, 1906.

The question raised by this appeal was whether a nervous shock received by a workman in the course of his employment was an "accident" which entitled him to compensation under the Workmen's Compensation Act, 1906. The facts as found by the county court judge were as follows:—

In October, 1909, the applicant,—a collier, forty-six years of age, who had been engaged in coal mining all his life, and for twenty-seven years had been working at the face of the coal in the pit belonging to the respondents,—while working as usual, heard a shout for help from the next working place. He ran round his loose end at once and found a fellow collier lying full length on the ground, having been knocked down by a fallen timber prop and some coal; he was bleeding all over his head and from his ears and eyes. The applicant picked him up in his arms and, with assistance, carried him away; he was not dead at the time, but died in a quarter of an hour. The effect on the applicant was such that he sustained a nervous shock, which incapacitated him from working at the coal face; he returned to his work on the Saturday, and at the order of the under-manager on the Monday following, but on neither occasion was he able to

do work, and after describing to the under-manager and the Government inspector on the Monday the details of what happened on the Saturday he left the pit; he then consulted his doctor and has been under his care since. In November he tried again to work, and went to his old place, but though he stayed the shift he was unable to work, and his brother, who was his mate, did it for him. In January, 1910, he asked the under-manager for a by-work job, but the under-manager would not give him one, and he had not worked since.

Proceedings for compensation having been taken, the county court judge found as a fact that there was a genuine incapacity to work which was due to the nervous shock which he sustained in October, 1909, when it clearly was his duty to his employers to go to the assistance of the injured collier who shouted for help from the next working place, and that his doing so arose both "in course of" and "out of" his employment. The learned county court judge accordingly awarded the applicant compensation at 19*s.* a week to the date of the award, and 10*s.* a week till further order.

The respondents appealed. The appeal was heard on July 5.

Simon, K.C., and *Shepherd*, for the appellants. It is admitted that what the applicant did to assist his fellow workman arose "out of and in the course of" his employment, but the applicant did not see the accident and he was not working with the deceased man when the prop gave way and the fall of coal occurred. There must be some direct physical connection between cause and effect, and when the effect produced is only due to excitement and alarm from an accident to another there is no "personal injury by accident" within s. 1 of the Workmen's Compensation Act, 1906. The county court judge seems to have considered *Pugh* v. *London, Brighton, and South Coast Ry. Co.* (1) an authority on this point, but that case is distinguishable as being an action to recover under the terms of a policy of insurance.

[*Atkin, K.C.*, pointed out that in *Clover, Clayton & Co., Ld.* v. *Hughes* (2), an appeal under the Workmen's Compensation Act,

(1) [1896] 2 Q. B. 248 (2) [1910] A. C. 242.

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Pugh v. *London, Brighton, and South Coast Ry. Co.* (1) was treated as applicable to cases under that Act.]

It is not contended that the nervous condition of a workman may not be the result of an accident, but here no "accident," in the common acceptance of the word, happened to the applicant; he is now suffering from ex post facto emotional effects, as the result of what happened to another workman.

Atkin, K.C., and *Greene*, for the applicant, were not called upon.

COZENS-HARDY M.R. The contention of the appellants is that the learned county court judge was wrong in holding that there was an accident to the applicant arising out of and in the course of his employment. It is true that the applicant did not meet with an accident which visibly and outwardly affected his body; but it is also true that on the findings of the learned county court judge, by which we are bound, he did meet with injury which, in the words of the county court judge, affected his nervous system. It created such a shock that it produced a physiological effect, although there was no abrasion, or cut, or wound visible to the eye.

The material facts are very shortly stated. [Having stated the facts as above, the Master of the Rolls continued:—] The learned county court judge finds most emphatically that it was not a case of malingering, that the applicant was genuinely unable to work, and that the effect on the applicant of what happened in October last was such that he sustained a nervous shock which incapacitated him from working at the coal face. It is true he returned to his work on the Saturday, and at the order of the under-manager on the Monday following; but on neither occasion was he able to do work. The learned county court judge on these facts held that the nervous shock caused to the applicant by the excitement and alarm of the accident to his fellow workman constituted personal injury to him caused by an accident arising out of and in the course of his employment which incapacitated him from working in his employment within the meaning of the Act and made an award in his favour.

(1) [1896] 2 Q. B. 248.

In my opinion, on that finding of fact it is impossible for us to say that the learned county court judge was wrong in law.

Speaking for myself, I should possibly have had some doubt whether *Pugh* v. *London, Brighton, and South Coast Ry. Co.* (1), which was a case on a policy of insurance, was to be regarded as of any great value in itself upon the question whether this case was "an accident" under the Workmen's Compensation Act; but, as Mr. Atkin has pointed out, in the House of Lords it was treated as an authority bearing upon this question in the recent case of *Clover, Clayton & Co., Ld.* v. *Hughes* (2), and I cannot, therefore, disregard it. If so, it is a very important and weighty authority in favour of the applicant. But quite apart from that, I think the decisions of this Court, including the recent decision in the case of *Eaves* v. *Blaenclydach Colliery Co., Ld.* (3), do shew that when a man in the course of his employment sustains a nervous shock producing physiological injury, not a mere emotional impulse, he meets with an accident arising out of and in the course of his employment. It is something unexpected, no doubt, in this sense, that I do not suppose the applicant thought for a moment, when he was doing what was plainly his duty in going to the rescue of his fellow workman, it would have this physiological effect on his system, but it had that effect. There is no malingering; it is a perfectly genuine case, and Mr. Simon has not suggested anything to the contrary.

I think, therefore, this is a case which falls within the Act of Parliament on the same principle and in the same way as if the man, on going to the rescue of the other collier, had been injured by this fall of coal, or had stumbled and fallen on his way there. That would have been a case undoubtedly within the Act; and I can see no real difference in principle, when once you get rid of the danger of malingering, between that case and the case where a physiological injury—physiological damage—is produced by reason of what happened to this man when he went in the course of his duty to the neighbouring stall and saw what had happened to his fellow workman. In my opinion the learned county court judge was right, and the appeal must be dismissed.

(1) [1896] 2 Q. B. 248. (2) [1910] A. C. 242.
(3) [1909] 2 K. B. 73.

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FARWELL L.J. I am of the same opinion. It is rightly conceded that it was part of the man's duty to go to the assistance of his fellow workman. Therefore there is no question that the events arose "out of and in the course of the employment." The learned county court judge has found as a fact that there was a genuine incapacity to work, which was due to the nervous shock which the applicant sustained in October last. In my opinion nervous shock due to accident which causes personal incapacity to work is as much "personal injury by accident" as a broken leg, for the reasons already expressed by this Court in the case of *Eaves* v. *Blaenclydach Colliery Co., Ld.* (1) In truth I find it difficult, when the medical evidence is that as a fact a workman is suffering from a known complaint arising from nervous shock, to draw any distinction between that case and the case of a broken limb. I see no distinction for this purpose between the case of the guard who is not in fact physically injured by an accident to his train, but who, after assisting to carry away the wounded and dead, breaks down from nervous shock, and the case of the guard who in similar circumstances stumbles over some of the debris and breaks his leg. The difficulty is to prove the facts so as to avoid the risk of malingering, but when the facts have been proved, the injury causing incapacity to work arises from the accident in the one case just as much as in the other. I am, therefore, of opinion that the judgment of the learned county court judge must be affirmed.

KENNEDY L.J. I am of the same opinion. It is beyond question that the incapacity of the applicant has arisen in the course of and out of the employment; and when you have a finding of fact by the learned county court judge that there has been a nervous shock, and that that nervous shock has produced a genuine condition of neurasthenia, I think myself the recent authorities shew that this judgment ought to be supported. One knows perfectly well that neurasthenia, although there may be no outward sign if you merely look at the person, is treated, and successfully treated in some cases at any rate, by a treatment of

(1) [1909] 2 K. B. 73.

the body. Directly you have that which requires treatment of the body, it means that a portion of that body (visible or invisible does not matter) is in a state of ill-health, and, if the condition of neurasthenia produces incapacity to work which has been brought about by something in the nature of an accident which arose "out of and in the course of the employment," you have a case of "personal injury by accident" which is within the Act.

Appeal dismissed.

Solicitors: *Vincent & Vincent, for Day & Yewdall, Leeds; Corbin, Greener & Co., for Raley & Sons, Barnsley.*

W. C. D.

THE KING *v.* PRIDGEON.

1910
June 20.

Revenue—Practice—Writ of Extent—Affidavit of Debt and Danger—Sufficiency of Affidavit—Motion to set aside Writ.

A writ of extent was issued upon an affidavit of debt and danger in which the deponent stated the fact that a debt was due to the Crown from a certain debtor, and the nature and origin of the debt, and proceeded to allege that from inquiries he had made he had ascertained and believed that the debt due to the Crown from the debtor would be lost unless some more speedy course than the ordinary method of proceeding were forthwith had and taken to recover the same on behalf of His Majesty.

On motion to set aside the writ:—

Held, that the affidavit was defective in that it omitted to state the facts from which the Court might infer that the debt was in danger of being lost.

The writ was accordingly set aside.

MOTION to set aside a writ of extent which had been issued against the applicant, Mrs. Emily Pridgeon. (1)

(1) A motion had been made before a Divisional Court for a rule nisi calling upon the Attorney-General to shew cause why the writ should not be set aside. This procedure not being considered regular was abandoned, and, the advisers of the Crown consenting to take notice of motion as duly given, the matter was heard upon motion before Bray J. as the judge who was taking Revenue cases.

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In the affidavit on which the writ issued the deponent stated the fact that a sum of 150*l.* was due and owing from the applicant to the Crown and the nature and origin of the debt, and proceeded as follows: "From inquiries I have made I have ascertained and believe that the debt due to His Majesty from the said Emily Pridgeon as aforesaid will be lost unless some more speedy course than the ordinary method of proceeding be forthwith had and taken to recover the same on behalf of His Majesty."

W. S. M. Knight, for the applicant. By the joint operation of the Crown Suits Act, 1865 (28 & 29 Vict. c. 104), s. 47, and the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 16, a writ of extent may be issued on an affidavit of debt and danger on the fiat of a judge of the High Court. In the affidavit it is necessary to state the debt due to the Crown and how it arose, and that it is in danger of being lost; and with respect to the allegation of danger the affidavit should contain not only a general allegation of the defendant's insolvency, but also some particular fact or instance proving or suggesting it, such as that he has committed an act of bankruptcy, stopped payment, or absconded: Annual Practice, 1910, vol. 2, p. 999; West on Extents, p. 53; *Rex* v. *Scott, Assignee of Rippon.* (1) The affidavit in the present case is clearly insufficient; it does not even allege insolvency, but merely states the deponent's information and belief that the debt will be lost if some more speedy process is not resorted to. If the affidavit of debt and danger is insufficient the writ may and ought to be set aside upon motion: West on Extents, p. 180.

Rowlatt and *G. Stuart Robertson*, for the Crown. The affidavit of debt and danger need not be in any particular form; all that is necessary is that the Court should be able to infer that the debt is in danger of being lost: *Rex* v. *Enderupp.* (2) It must, however, be admitted that this affidavit is not sufficiently explicit to conform to the standard set up by the authorities: *Rex* v.

(1) (1816) Cited West on Extents, p. 53. Qu. S. C. sub nom. *Rex in aid of Horn* v. *Rippon*, (1816) 2 Price, 398.

(2) (1723) Bunb. 134.

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Jans (1); but, granting that the affidavit is defective, the necessary facts can be stated in an affidavit and a fresh writ can be issued immediately. The only practical end gained by this motion is delay of the proceedings.

Knight, in reply. The question is not whether another writ can be, but whether this writ has been, issued regularly. It would open the door to great injustice if a writ irregularly issued should be allowed to stand on evidence which might have been, as distinguished from that which has been, adduced.

BRAY J. This is an unusual application. The Crown issued a writ of extent, which can be done ex parte on affidavit. The affidavit in the present case sets out the nature and origin of the debt, and then in paragraph 4 the deponent states, "From inquiries I have made I have ascertained and believe that the debt due to His Majesty from the said Emily Pridgeon as aforesaid will be lost unless some more speedy course than the ordinary method of proceeding be forthwith had and taken to recover the same on behalf of His Majesty." The ground on which I am asked to discharge this writ is that that affidavit is not sufficiently specific; that it ought to allege facts to shew that the debt is in danger. Undoubtedly there is authority for that proposition. In West on Extents, at p. 180, I find this: "If the affidavit be defective in the statement of the defendant's insolvency, the defendant may move to set it aside: and it is the more necessary that this statement should be complete, as the defendant has no means of contradicting or explaining the fact which is alleged as the proof of insolvency; the Court having refused to grant a rule to shew cause on counter affidavits as to that point: and that he could not traverse the fact of insolvency is clear; as it constitutes no part of the record, but is merely a statement in the affidavit required by the rules of the Court, as a ground for the exercise of their discretion in issuing the extent." Several cases are cited in favour of that statement, among them *Rex* v. *Scott, Assignee of Rippon* (2), and there are others to which my attention has been called. They establish

(1) (1731) Bunb. 300. See also *Rex in aid of Horn* v. *Rippon*, 2 Price, 398.
(2) Cited West on Extents, p. 53.

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Bray J.

that it is necessary to state facts leading to the conclusion that the debt is in danger. Even in a case where insolvency is alleged it is not sufficient simply to state the fact of insolvency without specifying facts which lead to that inference. The affidavit in the present case does not go so far as even to allege insolvency. It merely alleges that there is danger of the debt being lost. In my opinion the affidavit is insufficient and the proceedings are irregular.

Now it is suggested that I ought not to set this writ aside because the Crown can now shew all the necessary facts. But I think I ought not to yield to that suggestion because, this being an extraordinary remedy, it lies on the Crown to shew that the proceedings up to the present time have been regular and in order. It might lead to injustice if the writ irregularly issued in the first instance were allowed to stand because facts could be proved which, if they had been proved, would have made the original issue of the writ regular. In order that the practice may be regularly carried out, and in order to prevent possible injustice, I am bound to grant the motion and set aside this writ; and it must be set aside with costs.

Writ discharged.

Solicitor for applicant: *Alex. Ross.*

Solicitor for the Crown: *Solicitor to the Treasury.*

W. H. G.

COMMITTEE OF VISITORS OF GLAMORGAN COUNTY ASYLUM *v.* CARDIFF GUARDIANS.

1910
June 23.

Lunatic—Pauper Lunatic—Expenses of Maintenance—Reasonable Charges—Order of Justices—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *ss.* 283, 287.

On an application to justices for an order under s. 287 of the Lunacy Act, 1890, for the payment by the guardians of a poor law union of the reasonable charges of the expenses of maintenance of a pauper lunatic in an asylum, the justices have power to fix the amount of the payment to be made by the guardians; and in fixing that amount the justices are not restricted to the limit of 14*s.* a week imposed by s. 283.

Dictum of Wright J. in *Suffolk County Lunatic Asylum* v. *Stow Union*, (1897) 76 L. T. 494, explained.

Appeal from the county court of Glamorganshire holden at Cardiff.

The plaintiffs, the committee of the visitors of the Glamorgan County Asylum at Bridgend, sued the defendants, the guardians of the poor of the Cardiff Poor Law Union, under s. 314 of the Lunacy Act, 1890, to recover the sum of 48*l.* 11*s.* 6*d.* balance of amount due for the lodging, maintenance, medicine, clothing, and care of Sarah Gould and Anne Jones, two pauper lunatics confined in the said asylum, being at the rate of 1*l.* 1*s.* per week in respect of Gould and 17*s.* 6*d.* a week in respect of Jones from April 13, 1909, to February 8, 1910, which sums were ordered to be paid by the defendants to the plaintiffs under two orders dated respectively December 13, 1909, and made by two justices of the peace for the county of Glamorgan under s. 287 of the Lunacy Act, 1890. (1)

(1) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 283:

"(1.) Every visiting committee shall fix a weekly sum, not exceeding fourteen shillings, for the expenses of maintenance and other expenses of each pauper lunatic in the asylum and of such amount that the total of such weekly sums shall be sufficient to defray such expenses and also the salaries of the officers and attendants of the asylum, and such weekly sum may from time to time be altered.

"(2.) If fourteen shillings a week is found insufficient for the purposes aforesaid, the local authority to whom the asylum belongs, may by order direct such addition to be made to the weekly sum as to the local authority seems necessary, and every such order shall be signed by the clerk of the local authority, and

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The order of the justices relating to Gould recited that a complaint had been made by the plaintiffs that, in pursuance of an order of a justice of the peace, Gould, a pauper lunatic, then residing at the parish of Cardiff within the defendants' union, was on December 26, 1885, duly conveyed to the asylum for the county of Glamorgan at Bridgend; that at the time of making the said order she had a legal settlement in the parish of Cardiff; that she had ever since been, and still was, confined in the asylum as a lunatic; that by reason of the special care and treatment required by her state of health and mental condition the sum of 14*s.*, the weekly sum fixed by the plaintiffs for the lodging, maintenance, medicine, clothing, and care of each pauper lunatic in the asylum, was not sufficient in the case of Gould; and that since April 13, 1909, the plaintiffs had paid 36*l.* 15*s.* for the maintenance expenses of Gould in the asylum, of which sum the defendants had repaid to the plaintiffs 17*l.* 2*s.*

The order proceeded as follows: "Whereupon the said Court hath now duly inquired into the several matters alleged in the said complaint, and satisfactory evidence being now given to this Court therein, this Court doth adjudge the said complaint and the several recited allegations to be true and doth therefore accordingly order and adjudge that you" the defendants "do forthwith pay unto" the plaintiffs "the sum of 19*l.* 13*s.* And inasmuch as it has been proved to the said Court

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forthwith published in a local newspaper.

"(3.) A committee may fix a greater weekly sum, not exceeding fourteen shillings, to be charged in respect of pauper lunatics other than those sent from or settled in a parish or place within the county or borough to which the asylum belongs."

Sect. 287: "(1.) The justice by whom any pauper lunatic is sent to any institution for lunatics under this Act, or any two justices of the county or borough in which the institution for lunatics where any pauper lunatic is confined is situate, or from any part of which any pauper lunatic has been sent, or any two justices, being visitors of such institution, may make an order upon the guardians of the union to which the lunatic is chargeable, for payment to the treasurer, or manager of the institution, of the reasonable charges of the lodging, maintenance, medicine, clothing, and care (in this Act referred to as the expenses of maintenance) of such lunatic.

"(2.) Any such order may be retrospective or prospective, or partly retrospective and partly prospective.

"(3.) An order under this section shall not be subject to appeal."

that the said pauper lunatic is still in confinement as a lunatic in the said asylum this Court doth therefore further order" the defendants "to pay to" the plaintiffs "weekly and every week from the day of the date hereof the sum of twenty-one shillings, which sum appears to this Court to be a reasonable charge for the future lodging, maintenance, medicine, clothing and care of the said pauper for and during so long a time as the said pauper lunatic shall remain and be confined under the first mentioned order in the said asylum or such other asylum as she may hereafter be removed to."

The order for the payment of 17*s.* 6*d.* a week in respect of Jones, who had been taken to the asylum on May 3, 1887, from Cardiff, where she had a legal settlement, was in similar terms.

The defence to the action was that by reason of s. 283, sub-ss. 1 and 3, of the Lunacy Act, 1890, the defendants were not liable to pay more than 14*s.* a week in respect of each of the lunatics. They had paid at that rate during a part of the period in question, and as to the remaining part they were willing to pay at the same rate.

The county court judge in giving his decision said that he was not satisfied that he had any right to consider whether the justices' orders were ultra vires or not, but, assuming that he had, he was of opinion that the powers of the justices under s. 287 were not restricted to making an order for the payment of a sum not exceeding 14*s.* a week in respect of each lunatic; and he therefore gave judgment for the plaintiffs for the amount claimed.

The defendants appealed.

S. Davey, for the appellants. The appellants are not liable to pay more than 14*s.* a week in respect of each lunatic, and in so far as the orders of the justices require the appellants to pay more than that they are of no effect. The jurisdiction of the justices under s. 287 is limited to making an order for the payment of the reasonable charges of the expenses of maintenance. They have no power to fix the amount. That is done by the visiting committee under s. 283, sub-ss. 1 and 3, and by the local authority in cases under s. 283, sub-s. 2. The present case

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comes under s. 283, sub-s. 3, for these lunatics are out-county patients, and therefore the weekly payment cannot exceed 14*s*. The duties of the justices under s. 287 are purely ministerial: see *Suffolk County Lunatic Asylum* v. *Stow Union* (1), per Wright J.; and that view is strongly supported by the fact that the orders under s. 287 may be made ex parte and are not the subject of appeal, and an order once made cannot be varied. If the duties of the justices are not merely ministerial, but are judicial, one would have expected to have found a power given to them to enforce their orders, but instead of that, under s. 314 the money ordered to be paid is to be recovered by distress or action. Sect. 287 is required for the purpose of fixing the guardians with liability: see s. 295. If there is no limit to the amount which the justices can order under s. 287, there is no object in having the limit of 14*s*. in s. 283. It is true that s. 287 speaks of "the reasonable charges of the lodging, maintenance, medicine, clothing, and care (in this Act referred to as the expenses of maintenance) of each lunatic," whereas in s. 283 the expression is "expenses of maintenance and other expenses," but in reality the two sections are dealing with the same matter; this is shewn by referring to ss. 54 and 96 of the Lunacy Act, 1853, which are reproduced in ss. 283 and 287 of the Act of 1890. In any event, if the justices have power to fix the amount of the payment, it must not exceed 14*s*. The object of the Act is that there shall be one uniform sum payable in respect of all lunatics so as to avoid the necessity for inquiring into the circumstances of each particular case.

R. L. Vaughan Williams, for the respondents. The decision of the county court judge was right. The payments referred to in ss. 283 and 287 are not identical, for in fixing "the expenses of maintenance and other expenses" in s. 283 a total sum is to be arrived at sufficient to defray those expenses and also the salaries of the officers and attendants of the asylum; whereas under s. 287 the payment of a reasonable charge for the expenses of maintenance of the particular lunatic is to be ordered. In *Fitch* v. *Bermondsey Guardians* (2) Vaughan Williams L.J. said that the provisions of the Act of 1853 could not be looked at

(1) 76 L. T. 494. (2) [1905] 1 K. B. 524.

for the purpose of construing the Act of 1890. If the justices cannot fix the amount under s. 287 there is no other machinery provided in the Act for fixing it; and the absence from s. 287 of any reference to s. 283 is remarkable if the appellants' contention is correct. Sect. 287 is not required for the purpose of enforcing payment of the sums fixed under s. 283, for the right of the visiting committee to recover those sums is to be implied from s. 286. The use of the word "reasonable" and of the word "may" instead of "shall" in s. 287 shews that the duties of the justices under that section are not merely ministerial. It is true that the order may be made ex parte: *Reg.* v. *Bruce* (1); but there is nothing to prevent the justices from requiring notice to be given to the guardians of the application for an order, if they think fit; and in any case the question of the reasonableness of the amount ordered to be paid can be raised and contested in the action to enforce payment under s. 314. With regard to the suggestion that the justices cannot order a payment of more than 14*s.* a week, in *Finch* v. *Guardians of York Union* (2) a weekly payment of 17*s.* was ordered, but the point was never taken that that was beyond the powers of the justices.

[He was stopped.]

Davey in reply.

BRAY J. In my opinion the judgment of the county court judge was right. The action was brought to recover arrears of two weekly sums of 21*s.* and 17*s.* 6*d.* which the defendants had been ordered by justices, under s. 287 of the Lunacy Act, 1890, to pay to the plaintiffs. It was contended on behalf of the defendants that under s. 287 the justices have, in any event, no power to order a payment of more than 14*s.* a week; and that the justices are only empowered by s. 287 to make an order for the payment of reasonable charges, the amount of which has to be subsequently fixed under s. 283 by the visiting committee or by the local authority. The meaning of s. 287 appears, prima facie, to be perfectly plain. The justices are empowered to make an order for the payment "of the reasonable charges of the lodging, maintenance, medicine, clothing, and

(1) [1892] 2 Q. B. 136. (2) (1876) 2 Q. B. D. 15.

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care" of the lunatic. The section contains no reference to any other sections, and the use of the word "reasonable" would rather seem to imply a standard of payment different from that which would apply to cases under s. 283, in which that word is not used. It is, however, contended on behalf of the defendants that the justices can only order the payment of a sum to be fixed under s. 283. Under the first sub-section of that section the visiting committee shall fix a weekly sum, not exceeding 14*s*., "for the expenses of maintenance and other expenses" of each pauper lunatic in the asylum, "and of such amount that the total of such weekly sums shall be sufficient to defray such expenses and also the salaries of the officers and attendants of the asylum"; in other words, the standard by which the amount of the weekly sum is to be fixed under that section is not what is reasonable and fair to be paid for the maintenance of a particular lunatic, but a sum sufficient to defray the expenses of maintaining all the lunatics in the asylum, and the salaries of the staff, the object being to render the asylum, so far as possible, self-supporting; and the weekly sum is limited to 14*s*., except under sub-s. 2, which is not material to this case; and under sub-s. 3 a committee may charge a greater sum, not exceeding 14*s*., for lunatics coming from an outside district than is charged for the home lunatics, because, as was pointed out in *Fitch* v. *Bermondsey Guardians* (1), it may be that the cost of the home lunatics is only 12*s*. a week. But under s. 287 the amount of the weekly payment is based on entirely different considerations. It does not depend on the expenses of the asylum or the salaries of the officials, but it is to be a reasonable charge for certain services and accommodation which are to be rendered to the lunatic; the amount is not limited to 14*s*., and there is no reference in s. 287 to s. 283, although if it had been intended that the payments under s. 287 should be subject to the same limitations as those under s. 283 it would have been a very simple thing to have said so. Having regard to the language of s. 287 it is, in my opinion, impossible to hold that the amount of the reasonable charges payable under that section is limited to 14*s*. a week.

(1) [1905] 1 K. B. 524.

It was contended that the duties of the justices under s. 287 are purely ministerial, and that there is good reason why that should be the case, because an application for an order under that section may be made ex parte, and the order of the justices is not subject to appeal. It is true that in *Suffolk County Lunatic Asylum* v. *Stow Union* (1) Wright J. said that an order under s. 287 is ministerial, but he was not then dealing with the point which we have to consider, and I doubt whether he used the word "ministerial" in the sense in which it is used in the argument for the plaintiffs. All that was decided in *Suffolk County Lunatic Asylum* v. *Stow Union* (1) was that the Court was not precluded from considering whether the order of the justices in that case was good, the fact being that there was a previous order still in existence. I agree with the decision in that case, and I am also disposed to think that in an action to recover the amount due under an order of the justices the county court judge has power to consider whether the amount ordered to be paid is in fact reasonable. I do not, however, decide that point, as it is unnecessary in this case to do so. With regard to the point that the justices are only empowered to make an order for the payment of reasonable charges, without fixing the amount, it seems to me to be most unlikely that that was intended. The justices are entitled to hear evidence from both sides, although they are not bound to do so, and they are, therefore, in a position to form an opinion as to what is a reasonable charge in the particular case before them, and it would be a most wasteful procedure if it were necessary to hold another inquiry before a different tribunal in order to settle the amount of the reasonable charges. The county court judge in deciding this case assumed that he was not bound by the justices' order, and, in my opinion, he rightly held that an order under s. 287 is not limited to such a sum as may be fixed under s. 283.

Lord Coleridge J. In my opinion the argument that s. 287 merely provides the machinery for enforcing s. 283 is unsound. The description of the sum to be fixed by the visiting committee

(1) 76 L. T. 494.

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under s. 283 differs entirely from the description of the charges which the justices may find to be due under s. 287, and if the Legislature had intended that s. 287 should merely be the machinery for carrying into effect the provisions of s. 283 it would have been perfectly simple to have expressed that intention in terms. Not only is the description of the expenses different in the two sections, but in s. 287 a qualification is introduced, for the justices are to order only the "reasonable" charges for the expenses. I am unable to concur in the view put forward as to the meaning of the word "ministerial" when applied to the duties of the justices under s. 287. The justices have to inquire whether the charges, the payment of which they are asked to order, are reasonable, and it is clear that that involves an exercise of judgment on their part, and a decision following that exercise of judgment cannot in my opinion be described as ministerial. The language of Wright J. in *Suffolk County Lunatic Asylum* v. *Stow Union* (1) was used with regard to a different question, namely, whether an order under s. 287, made in ignorance of the existence of an earlier and valid order, could be set aside, and it was in pointing out that the second order had been made by mistake that Wright J. used the word "ministerial."

For these reasons I am of opinion that the decision of the county court judge was right.

Appeal dismissed.

Solicitors for plaintiffs: *W. H. Martin & Co., for Davis & Evans, Cardiff.*

Solicitors for defendants: *Smith, Rundell & Co., for A. H. Bullock, Cardiff.*

(1) 76 L. T. 494.

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
1910
July 8.

GILBERT *v.* OWNERS OF STEAM TRAWLER NIZAM.

Employer and Workman—Compensation—Accident arising out of and in Course of Employment—Seaman returning to Ship—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

An engineer on a ship which was lying in dry dock, after completing his morning's work of getting stores on board, went home to his dinner, and on his return fell into the dry dock, where his dead body was found:—

Held, that there was no evidence that the accident arose out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1906, and that his dependants were not entitled to compensation.

APPEAL from an award of the county court judge of Great Grimsby sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant was the widow of one Gilbert, who was second engineer on board the steam trawler Nizam. The ship was lying in dry dock on December 14, 1909, the date of the accident. The material facts, as stated in writing by the chief engineer and agreed to by both parties, were as follows:—"His" (Gilbert's) "duties were on that day as follows: (1.) To help me pack the engines—that is, to place asbestos packing in the stuffing box of the high pressure engine; that took us from 8.30 to about 9.15 A.M. (2.) We got our next orders from Mr. Baxter, the superintendent engineer, to get our stores aboard which were required for the engine room, consisting of three kinds of oil—viz. engine oil, colza oil, and cylinder oil—also packing, waste, and soap. We had got all our stores aboard as the buzzer went at 12.30; then Gilbert and I went to dinner. On our way we had a glass of beer together at the Humber Hotel. Gilbert went home and I also went home. The only work we had to do during the afternoon was to square up the engine room—that is to replace all the spanners, brush out the engine room, and generally clear up ready for sea. We should not have more than two hours work. I met him after dinner at Humber Street corner at about 1.30. We went down Humber Street and over the bridge and

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up to the new dry dock. We got to the side of the dry dock and some young man came up and spoke to Gilbert. I did not know him. I left them and went aboard and never saw him alive again. After 12.30 he had no more work ashore to do. All the work we had to do was on board the ship. We were not required to assist the fitters who were working on board overhauling the winch on deck and the air pump in the engine room." Gilbert apparently fell over the jetty into the dry dock where his dead body was found.

The learned county court judge said that it was usual for seamen when in port to take their meals on shore, and, relying on the judgment of Collins M.R. in *Morris* v. *Mayor of Lambeth* (1), found that the deceased was on shore as a duty to get his dinner and in the course of his employment, and he made an award in favour of the applicant. The employers appealed.

W. H. Owen, for the employers. There is no evidence that the accident to the deceased seaman arose out of and in the course of his employment. At the time of the accident he was not on ship's business: *Moore* v. *Manchester Liners, Ld.* (2); *Hewitt* v. *Owners of the Ship Duchess.* (3)

Herbert Ward (*Hollis Walker* with him), for the applicant. The deceased man was on duty at the time of the accident. The judge finds that it was usual for the men to have dinner at home when the ship was in dock. The mere fact of taking dinner does not make a break in the employment: *Blovelt* v. *Sawyer* (4); *Rowland* v. *Wright.* (5) A seaman stands in a different position from an ordinary workman and is under the control of the master throughout his term of service. The accident to the deceased happened on the scene of his work, and it is a fair inference from the evidence that he met his death while going on board to his work.

COZENS-HARDY M.R. I think this appeal must succeed. The learned county court judge has laid down some propositions of

(1) (1905) 22 Times L. R. 22.
(2) [1909] 1 K. B. 417; since reversed by the House of Lords, [1910] W. N. 184.
(3) (1910) 3 B. W. C. C. 239.
(4) [1904] 1 K. B. 503.
(5) [1909] 1 K. B. 963.

law which if adopted would have a startling effect. After quoting the opinion expressed by Collins M.R. in *Morris* v. *Mayor of Lambeth* (1) that "the act of preparing and taking food, unless there was any prohibition with regard to it as to place, was part of the man's duties," he says: "It is usual for seamen when in port to take their meals on shore. There was no prohibition. There is no evidence before me that dinner was obtainable or prepared on board for any seaman or that he was to take it there. Relying on the judgment of the Master of the Rolls I find that the deceased was on shore as a duty to get his dinner and in the course of his employment," and on that basis he finds for the dependants of the deceased engineer. I must now shortly state the admitted facts. The deceased man was second engineer on a steam trawler which was lying in dry dock, and in conjunction with the chief engineer he had the duty of getting certain stores on board the trawler. He was engaged on that duty till 12.30. After that he had no more work on shore to do. Then the deceased man, who lived at Grimsby, went home to dinner. He was not wanted back very speedily, and on his way back he met the chief engineer at a street corner. That was about 1.30. Then the chief engineer says: "We got to the side of the dry dock and some young man came up and spoke to Gilbert. I did not know him. I left them and went aboard and never saw him alive again." And then his dead body was found in the dry dock. That is all we know. Under these circumstances it seems to me that if this decision is to stand every workman in any employment will be entitled to claim the benefits of the Act if an accident happens to him on his way from his own home to the factory or ship or other place of employment. I decline to say that a ship for this purpose is in any different position from a factory. This is a simple case where a man has been to his own home and has met with an accident on his way back. This question has been decided not once but again and again by this Court. I might refer to my judgment in *Cremins* v. *Guest, Keen & Nettlefolds, Ld.* (2) (the workmen's train case), where the county court judge found that it was an implied term of the contract of employment that these trains should be

(1) 22 Times L. R. 22. (2) [1908] 1 K. B. 469.

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provided by the employers and that the men should have the right, if not the obligation, to travel to and fro without charge. In that case we held that the man was entitled to compensation, but at the end of my judgment I say this: "To avoid misconception, I desire to say that I base my judgment on the implied term of the contract of service, and that it by no means follows that every workman is entitled to the protection of the Act whenever an accident happens to him on his way from his home to his employer's place of business." Every word of that applies in the present case. The decisions of this Court have been numerous and unvarying that it is for the applicant to prove that the accident arose out of and in the course of the employment. I do not mean by that that there must necessarily be direct evidence of that fact; it is sufficient if there is evidence which will justify the county court judge in drawing that inference without any direct evidence. But when we know nothing more than that this man's body was found in the dry dock, that he had gone home to get his dinner and that he had been seen talking to somebody on his way back before the accident, in my opinion there is not a particle of evidence to justify the Court in inferring that this accident arose out of and in the course of his employment. The appeal must be allowed.

FARWELL L.J. I am of the same opinion. I think that the case is concluded by the statement of facts. The workman has to prove that the accident arose out of as well as in the course of his employment. The necessity for food no more arises out of his employment than the necessity for sleep. The man who is crushed by a falling wall on his employer's premises while he is eating his dinner recovers compensation because he is entitled to be on the spot by virtue of his contract of employment (as I have explained in *Gane* v. *Norton Hill Colliery Co.* (1)) notwithstanding that, and not because, he was eating his dinner; but it is no part of his contract of employment that he should go home or eat or drink or sleep at home or anywhere else. Unless the words "out of his employment" are struck out of the Act, this claim cannot stand. If any authority were needed it is to be found in *Bender*

(1) [1909] 2 K. B. 539, at p. 545.

v. *Owners of Steamship Zent* (1) and *Marshall* v. *Owners of Steamship Wild Rose* (2), recently affirmed in the House of Lords, which in my opinion completely cover this case.

KENNEDY L.J. I agree and have nothing to add.

Appeal allowed.

Solicitor for appellants: *John Tonge, Great Grimsby.*

Solicitors for respondent: *Bloomer & Kearsey, Great Grimsby.*

H. B. H.

1910
April 13, 14.

THE GUARDIANS OF THE POOR OF THE SOUTHWARK UNION, APPELLANTS *v.* THE LONDON COUNTY COUNCIL, RESPONDENTS.

Education — Blind or Deaf Child — Child boarded out and educated by Education Authority—Child without Means of Support—Recovery of Expenses from "Parent"—Liability of Guardians of Union—Elementary Education Act, 1870 (33 & 34 *Vict. c.* 75), *s.* 3—*Elementary Education (Blind and Deaf Children) Act,* 1893 (56 & 57 *Vict. c.* 42), *ss.* 2, 9.

By s. 2, sub-s. 1, of the Elementary Education (Blind and Deaf Children) Act, 1893, it is the duty of every education authority to enable blind and deaf children resident in their district, for whose elementary education efficient and suitable provision is not otherwise made, to obtain such education in some school certified as suitable for providing such education, and for that purpose, where necessary or expedient, to make arrangements for boarding out any blind or deaf child in a home conveniently near to the certified school where the child is receiving elementary education. By s. 9, sub-s. 1, where an education authority incur any expense under this Act in respect of any blind or deaf child, "the parent of the child shall be liable to contribute towards the expenses of the child such weekly sum" as may be agreed on or settled by a Court of summary jurisdiction. By s. 15, the expression "expenses" includes the expenses of and incidental to the attendance of the child at school and the maintenance and boarding out of the child while so attending school; and other expressions have the same meaning as in the Elementary Education Acts.

By s. 3 of the Elementary Education Act, 1870, the term "parent" includes guardian and every person who is liable to maintain or has the actual custody of any child.

A deaf child was boarded out and educated by the education authority

(1) [1909] 2 K. B. 41.
(2) [1909] 2 K. B. 46; affirmed by the House of Lords, [1910] W. N. 179.

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at a certified school, and the father agreed to contribute 1*s.* a week towards the expenses. The father died leaving the child without any means of support, and there was no relation who was legally liable to maintain the child. The child's place of settlement was in Southwark. The education authority claimed that the guardians of the Southwark Union were liable, under s. 9, sub-s. 1, of the Elementary Education (Blind and Deaf Children) Act, 1893, to contribute towards the expenses of the maintenance and education of the child since the death of the father, as being "liable to maintain" the child and therefore the "parent" within the meaning of the section, inasmuch as, if the child became chargeable, they would be bound to support him :—

Held, that the fact that, if the child became chargeable, the guardians of the union would be bound to support him did not make them "liable to maintain" him, and that therefore they were not the "parent" of the child within the meaning of the section and were not liable to contribute towards the expenses.

CASE stated by a metropolitan police magistrate.

A complaint was made on behalf of the respondents, the London County Council, for that the appellants, the guardians of the poor of the Southwark Union, were the parent within the meaning of s. 9 of the Elementary Education (Blind and Deaf Children) Act, 1893, of a certain deaf child called Alfred Garlick then being educated and maintained by the respondents, and as such parent were liable under and by virtue of the Act to contribute towards the expenses incurred by the respondents such weekly sum as might be agreed between the respondents and the appellants, and further that the appellants had failed so to agree.

Alfred Garlick was born on April 22, 1894, at No. 8, Mann Street, Walworth. About the year 1900 he began to grow deaf owing to consumptive tendencies. Since 1902 he had been totally deaf.

The father of the boy was William Garlick, who lived before and since the birth of his son at 8, Mann Street, and afterwards at 81, Blenden Row, Walworth, and at 81, Alexandra House, East Street, Walworth, all being in the appellants' union, and he gained a settlement by three years' residence in the parish of St. Mary, Newington, in the appellants' union, without break and without poor law relief. William Garlick afterwards removed to 56, Avenue Road, Camberwell, in the appellants' union, from

which address he was removed as hereinafter mentioned to the appellants' union infirmary.

Alfred Garlick attended the John Ruskin public elementary day school as an ordinary scholar. On June 16, 1902, the following report was made to the special schools sub-committee of the London School Board (the predecessors of the London County Council) by Mr. Jones, their superintendent of instruction of blind and deaf children, as to Alfred Garlick:—"This boy attends the John Ruskin school irregularly, and as the school is over full I suggest that he be boarded out at Balham. He has no mother, and it appears that he is out late at night."

This was agreed to by the sub-committee, and on July 21, 1902, the boy was removed from 4, Havelock House, Crosslet Street, Walworth, where he was then residing with his father, and was placed with Mrs. Flood, of 76, Ormely Road, Balham.

The chairman of the special schools sub-committee fixed the contribution to be paid by William Garlick, the father, at 1*s.* per week.

On August 17, 1902, the following undertaking was signed by William Garlick, then living at Alexandra House, East Street, Walworth:—

"School Board for London.

"Agreement to contribute towards maintenance, &c.

"In consideration of the School Board for London under the provisions of the Elementary Education (Blind and Deaf Children) Act, 1893, and the regulations of the Board of Education boarding out Alfred Garlick, a deaf child, with foster parents in order that he may attend a certified school for the deaf, I hereby undertake as follows:—(1.) To contribute a sum of 1*s.* per week towards the child's maintenance while boarded out. (2.) Not to withdraw the child without giving two weeks' notice in writing to the Board before such withdrawal. (3.) To remove the child from the foster parent in the event of being called upon to do so by the School Board. (4.) To pay in the event of serious illness any extra expenses which may devolve upon the Board in consequence of such illness or in the event of death to pay the interment expenses."

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All the proceedings which led to this undertaking being signed were taken at the instance of the School Board for London and their officers, and neither the appellants nor their officers had any knowledge of the above agreement nor of the boy Alfred Garlick, nor was any application made to them on the subject.

Under and in pursuance of the Education (London) Act, 1903, the property, powers, rights, and liabilities of the School Board for London were transferred to the respondents.

Alfred Garlick remained boarded out with Mrs. Flood at the above address until June 23, 1906, when he was removed from Mrs. Flood's house and boarded out with Emily Briers, at 377, New King's Road, Fulham, by order of the respondents, and he remained there until January 20, 1908, when he was removed to the county council Anerley residential school for elder deaf boys, where he was maintained and educated at the expense of the respondents down to the present time.

In July, 1906, William Garlick, the father, was removed to the Champion Hill infirmary, belonging to the appellants, and maintained there at the cost of the appellants.

On October 9, 1907, the county council education committee resolved that until further order the parent's contribution in the case of Alfred Garlick be remitted.

On April 18, 1908, William Garlick died in the infirmary. His wife, the mother of the boy, had died some years previously. The boy had no other relation legally liable to maintain him, and no claim was made upon any other relation by the respondents.

Up to September 19, 1908, the respondents did not communicate with the appellants in any way upon the subject. On that day the respondents applied by letter to the appellants as follows:—

"London County Council,
"Education Department (Executive),
"Victoria Embankment, W.C.,
"19th September, 1908.

"Sir,

"Alfred Garlick (deaf).

"I am directed by the council to call the attention of your guardians to the case of Alfred Garlick, who is at present a

resident pupil at the Anerley school for elder deaf boys. The father, who appears to have been resident for a number of years in your parish at 81, Blenden Row, Walworth, died in the Champion Hill infirmary on 18th April last, and the boy is left quite destitute. In these circumstances I am to ask if you will be good enough to bring the case before the notice of your guardians with a view to their becoming responsible for the child and paying for his maintenance at the Anerley school at the rate of £33 per annum.

"I am, Sir,

"Your obedient servant,

"(Sgd.) R. Blair,

"Executive Officer.

"The clerk to the Guardians of the Poor
in the parish of Newington."

Further correspondence passed between the appellants and the respondents, and ultimately the appellants disputed liability to make any contribution towards the maintenance of Alfred Garlick on the ground that they considered that Parliament had placed the duty of maintaining cases such as his on the respondents.

Upon the hearing of the complaint it was agreed that, if the appellants were in law liable to make a contribution, the amount thereof should be 12*s.* 6*d.* per week.

It was contended as a matter of law on behalf of the respondents that by reason of the foregoing facts the appellants were the "parent" of Alfred Garlick within the meaning of s. 9 of the Elementary Education (Blind and Deaf Children) Act, 1893 (1), and were therefore liable to contribute towards the

(1) 56 & 57 Vict. c. 42, s. 1, sub-s. 1: "The efficient elementary instruction which under the Elementary Education Act, 1876, a parent must cause his child to receive shall, in the case of a blind or deaf child, be construed as including instruction suitable to such a child, and the fact of a child being blind or deaf shall not of itself, except in the case of a deaf child under seven years of age, be a reasonable excuse for not causing the child to attend school, or for neglecting to provide efficient elementary instruction for the child."

Sect. 2, sub-s. 1: "It shall be the duty of every school authority, as defined by this Act, to enable blind and deaf children resident in their district, for whose elementary

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expenses of such child such weekly sum as might be agreed on or settled by a Court of summary jurisdiction within the meaning of that section.

It was contended on behalf of the appellants that, having regard to the foregoing facts, they were not the "parent" of the child within the meaning of the Act, and were under no liability to contribute towards such expenses.

The magistrate held that the contention of the respondents was right, and he made an order that the appellants should pay

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education efficient and suitable provision is not otherwise made, to obtain such education in some school for the time being certified by the Education Department as suitable for providing such education, and for that purpose either to establish or acquire and to maintain a school so certified, or to contribute, on such terms and to such extent as may be approved by the Education Department, towards the establishment or enlargement, alteration, and maintenance of a school so certified, or towards any of these purposes, and, where necessary or expedient, to make arrangements, subject to regulations of the Education Department, for boarding out any blind or deaf child in a home conveniently near to the certified school where the child is receiving elementary education."

By s. 4, the school authority for the purposes of the Act is, for an area under a school board, the school board.

Sect. 9, sub-s. 1: "Where a school authority incur any expense under this Act in respect of any blind or deaf child, the parent of the child shall be liable to contribute towards the expenses of the child such weekly sum, if any, as, regard being had to the provisions of the Elementary Education Act, 1891, may be agreed on between the school authority and the parent, or, if the parties fail to agree, as may, on the application of either party, be settled by a Court of summary jurisdiction, and any sum so agreed on or settled may, without prejudice to any other remedy, be recovered by the school authority summarily as a civil debt."

By s. 11, the period of compulsory education in the case of a blind or deaf child shall extend to sixteen years.

Sect. 15, sub-s. 1, after defining, among other expressions, "expenses," when used in relation to a child, as including "the expenses of and incidental to the attendance of the child at a school, and of and incidental to the maintenance and boarding out of the child while so attending, and the expenses of conveying the child to or from the school," provides that "other expressions have, unless the contrary intention appears, the same meaning as in the Elementary Education Acts, 1870 to 1891."

Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 3: "In this Act . . . . the term 'parent' includes guardian and every person who is liable to maintain or has the actual custody of any child."

to the respondents the sum of 12*s.* 6*d.* per week towards the expenses of Alfred Garlick thenceforth during the time he should be educated and maintained by the respondents under the provisions of s. 9 of the Elementary Education (Blind and Deaf Children) Act, 1893.

The question for the opinion of the Court was whether the appellants were in law the "parent" of the child within the meaning of the Act and as such liable to contribute towards the above-mentioned expenses.

Cox-Sinclair, for the appellants. The appellants are not "liable to maintain" this child within the meaning of the definition of "parent" in s. 3 of the Elementary Education Act, 1870, so as to make them liable to contribute towards the expenses of the maintenance and education of the child under s. 9, sub-s. 1, of the Elementary Education (Blind and Deaf Children) Act, 1893. The definition of "parent" in s. 3 of the Act of 1870 is by virtue of s. 15, sub-s. 1, of the Act of 1893 incorporated in that Act. Sect. 3 of the Act of 1870 defines "parent" as including the "guardian and every person who is liable to maintain or has the actual custody of any child." That means a parent or some one who is placed as regards the maintenance or custody of the child in a position towards it ejusdem generis with that of a parent. It does not include a board of guardians who have not the custody of the child and who have no present liability to maintain it. The respondents, as the local education authority, first by boarding out the child and then by placing him in their residential school at Anerley, have taken upon themselves the custody and maintenance of the child, and as such may come within the definition of "parent" in the Act. The persons who are liable to maintain others are specified in s. 6 of the Poor Relief Act of 1601 (43 Eliz. c. 2) and later Poor Law Acts, and the words "liable to maintain" are not apt words to describe the obligation of a board of guardians to relieve persons if and when they become chargeable. The distinction between the obligation of the poor law authorities to grant relief to paupers and the obligation of the parent or other person to maintain another is drawn in ss. 1 and 6 of

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the Act of 1601, and has been followed in subsequent Acts, e.g., ss. 54, 56, 57, 71, and 84 of the Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76). The liability to maintain is independent of and exists before the person becomes chargeable to the parish. Sect. 10 of the Act of 1893, which provides that the parent of a blind or deaf child shall not, by reason of any payment made under this Act in respect of the child, be deprived of any franchise, right, or privilege, or be subject to any disability or disqualification, points to the fact that the word "parent" is used in the Act in its ordinary sense. Further, s. 2, sub-s. 2, of the Act provides that the duty of a school authority under that section shall not extend to children who are "(*a*) idiots or imbeciles; or (*b*) resident in a workhouse or in any institution to which they have been sent by a board of guardians from a workhouse; or (*c*) boarded out by guardians"; and s. 13, sub-s. 1, repeals any enactment which empowers boards of guardians to send blind or deaf children to school except as to the three classes of children above mentioned. The effect of those enactments is to divide blind or deaf children substantially into two classes, one of which is left to boards of guardians to maintain as paupers, and the other is left to the education authority to deal with. The decision of the magistrate, if upheld, would place this child in the position of a pauper child, though he has never become chargeable to the parish. Boards of guardians therefore are not within the word "parent" in s. 9 of the Act of 1893, and the decision of the magistrate was wrong. [*School Board for London* v. *Jackson* (1) was referred to.]

Ryde, for the respondents. The guardians of a union are under a liability to maintain a pauper before the pauper becomes chargeable. A pauper receives relief because there is a previous liability on the part of the guardians to maintain him. For instance, when a pauper becomes chargeable to a parish in which he is not settled, the liability of the parish in which he is settled to maintain him exists before an order of justices enforcing that liability is made. Boards of guardians are therefore liable as "parents" within the meaning of the Elementary Education Acts, 1870 and 1876, to send pauper children to school. Apart

(1) (1881) 7 Q. B. D. 502.

from the guardians being in the position of parents within the meaning of the Education Acts there is no statutory duty upon them to send pauper children generally to school. Sect. 1 of the Poor Law (Certified Schools) Act, 1862 (25 & 26 Vict. c. 43), which empowers guardians to send "any poor child" to a certified school, is only an enabling section and does not create a duty. Article 114 of the General Poor Law Order, 1847, which was made under s. 15 of the Poor Law Amendment Act, 1834, imposes upon the guardians the duty of educating those children who are inmates of workhouses, and the General Order of January 30, 1897, extends that obligation. The words "liable to maintain" are wide enough to include both persons who are liable under the Poor Relief Act, 1601, and the Acts amending it, to maintain a child, and also persons who are bound under those Acts to give relief. For instance, in s. 84 of the Poor Law Amendment Act, 1834, the liability of a parish to relieve its poor is spoken of as a liability "to pay the cost and expense of the relief and maintenance" of the poor. There is no real distinction between the two forms of words. The expressions "liable to maintain" and "has the actual custody" in s. 3 of the Elementary Education Act, 1870, no doubt overlap each other in the case of guardians of a union where the child is in their workhouse, but they also overlap in the case of a father or mother. A board of guardians would be liable to contribute under s. 9 of the Act of 1893 in the case of a blind or deaf child boarded out by them and sent to the local education authority's school, and this would be because the guardians would be liable to maintain it, though the child would not be in their actual custody. The word "parent" in s. 1 must have the extended meaning given to it by s. 3 of the Act of 1870, because, if it were not so, and the parent were dead, the grandfather who had the custody of the blind or deaf child would have no duty to send the child to school. The word must therefore in s. 1 include a person who is liable to maintain or has the actual custody of the child, and therefore includes a board of guardians, and the same meaning must be given to the word in s. 9. Sect. 2, sub-s. 1, imposes the duty upon the education authority of providing school instruction for blind and deaf children, and sub-s. 2 excepts from that obligation the three classes of children therein

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mentioned so as to prevent unnecessary multiplication of schools; and s. 13, sub-s. 1, is a correlative section, repealing any enactment empowering boards of guardians to send blind or deaf children to school with the exception of the three classes above mentioned. If a blind or deaf child is in a workhouse, the guardians have to educate it and may send it to a school of their own; if they allow it to go to a school belonging to the local education authority, they must under s. 9 of the Act of 1893 contribute towards the expense of its education. The word "child" in s. 4 of the Elementary Education Act, 1876 (39 & 40 Vict. c. 79), which declares it to be the duty of a parent to cause his child to be educated, and in s. 5, which regulates the employment of a child, includes a child who is an inmate of a workhouse. If the guardians of a union, who have the custody of a child in their workhouse, are the "parent" of the child within the definition in s. 3 of the Act of 1870, it would be an extraordinary result if it were held that when they neglect their duty and do not take charge of the child they are not the "parent" and can escape liability. The true meaning of the Act of 1893 is that s. 1 includes within the word "parent" a board of guardians, and therefore they are liable as the "parent" to contribute towards the expenses incurred by the local education authority in educating the child. The decision of the magistrate was therefore right.

Cox-Sinclair in reply.

LORD ALVERSTONE C.J. This case seems to me to raise a question of difficulty, as to which I have for some time felt doubt. The view taken by the magistrate is this: that by the Elementary Education (Blind and Deaf Children) Act, 1893, it is the duty of the respondents as the education authority to educate a blind or deaf child, and they may, under the provisions of s. 9, sub-s. 1, of the Act, recover a contribution towards the expenses from the parent, the word "parent" having the same meaning as in the Elementary Education Act, 1870, and therefore including a person liable to maintain the child; that this child, who is a deaf child without any means of support, and who has no relation or other person liable to maintain him, if he becomes

chargeable as a pauper will become chargeable to the Southwark Union, as his place of settlement is in Southwark; and that therefore the appellants may properly be considered to be the persons liable to maintain the child (the word "person" including a body corporate), and therefore "the parent" of the child within the meaning of s. 9, sub-s. 1, of the Act. I thought at one time during the argument that that view was correct, but upon consideration I think that it is not.

Sect. 1, sub-s. 1, of the Act provides that the efficient elementary instruction which under the Elementary Education Act, 1876, a parent must cause his child to receive shall, in the case of a blind or deaf child, be construed as including instruction suitable to such a child. If it could have been shewn that the efficient elementary instruction which under the Elementary Education Acts a parent must cause his child to receive included the efficient elementary instruction which a board of guardians give to the children who are in their workhouse, a strong point in favour of the respondents would have been made. I cannot, however, find in the Elementary Education Acts, 1870 or 1876, any such provisions as would lead me to think that the "parent" referred to in s. 1, sub-s. 1, of the Act of 1893 includes a board of guardians. By s. 2, sub-s. 1, "it shall be the duty of every school authority as defined by this Act to enable blind and deaf children resident in their district, for whose elementary education efficient and suitable provision is not otherwise made, to obtain such education in some school for the time being certified by the Education Department as suitable for providing such education, and for that purpose either to establish or acquire and to maintain a school so certified, or to contribute . . . . towards the . . . . maintenance of a school so certified, or towards any of these purposes, and, where necessary or expedient, to make arrangements . . . . for boarding out any blind or deaf child in a home conveniently near to the certified school where the child is receiving elementary education." The words "blind and deaf children for whose elementary education efficient and suitable provision is not otherwise made" clearly do not include all children the expense of whose education falls upon a board of guardians,

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because sub-s. 2 says that the duty of a school authority under this section shall not extend to, among others, children who are boarded out by guardians. Since the Poor Law (Certified Schools) Act, 1862, boards of guardians have had power to board out pauper children, including blind or deaf children, at a certified school, and therefore it was part of the legislation in existence at the time when the Elementary Education Act, 1870, was passed that the children boarded out by guardians should not be children for whom it was the duty of the school authority to provide efficient elementary education. Accordingly, in considering what is the obligation of the parent of a blind or deaf child under s. 1 of the Act of 1893, and the duty imposed upon the school authority under s. 2 as to making provision for the education of blind and deaf children, children who are chargeable to the union and who are under the control of the guardians, and the expense of whose education the guardians must, at any rate in the first instance, bear, are not intended to be included.

I now come to s. 9, upon which the respondents mainly rely. By sub-s. 1 of that section, "where a school authority incur any expense under this Act in respect of any blind or deaf child, the parent of the child shall be liable to contribute towards the expenses of the child such weekly sum, if any, as, regard being had to the provisions of the Elementary Education Act, 1891, may be agreed on between the school authority and the parent, or, if the parties fail to agree, as may on the application of either party be settled by a Court of summary jurisdiction, and any sum so agreed on or settled may, without prejudice to any other remedy, be recovered by the school authority summarily as a civil debt." It is under that section that the present proceedings are taken. The magistrate was asked to say how much the appellants, as being persons liable to maintain the child and therefore the "parent" of the child, were to pay. Sect. 13 repeals any enactment which empowers boards of guardians to send blind or deaf children to school, except (following the language of s. 2, sub-s. 2) children who are (*a*) idiots or imbeciles; or (*b*) resident in a workhouse or in an institution to which they have been sent by a board of guardians

from a workhouse; or (*c*) boarded out by guardians. Here again we find a reference to the obligation of boards of guardians as to children boarded out by them. Then I come to s. 15, which provides that "the expression 'expenses' when used in relation to a child includes the expenses of and incidental to the attendance of the child at a school, and of and incidental to the maintenance and boarding out of the child while so attending, and the expenses of conveying the child to or from the school"; and it further provides that "other expressions have, unless the contrary intention appears, the same meaning as in the Elementary Education Acts, 1870 to 1891."

In these circumstances ought we to take the view that because the child would become chargeable to the appellants' union, if it became chargeable at all, the appellants are therefore "the parent" of the child within the meaning of s. 9? The word "parent" is described in s. 3 of the Elementary Education Act, 1870, as including "guardian and every person who is liable to maintain or has the actual custody of any child." The contention on the part of the respondents is that the appellants come within the words "liable to maintain" the child. It is said that, as the father is dead and there is no relation who is legally liable to maintain the child, and as the child is without any means of support, the child would become chargeable to the Southwark Union but for the fact that it was being maintained and educated by the respondents, and that therefore the guardians of the union can properly be considered as the persons liable to maintain him. It is important to remember that this child was not originally dealt with as a pauper child at all. The child was boarded out by the school board under the powers conferred upon them by s. 2, sub-s. 1, of the Act of 1893, and they made an agreement with the parent that the latter should contribute 1*s.* a week towards the child's maintenance while he was boarded out. Therefore it is not by virtue of any dealing by the appellants with this child that it is said that the obligation on their part to contribute towards the expenses of the child's maintenance and education arises; it is said that by reason of the possible ultimate chargeability of the child upon the

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Southwark Union the appellants are persons who are "liable to maintain" the child.

The words "liable to maintain" in the definition of "parent" in s. 3 of the Elementary Education Act, 1870, are necessary in order to include others besides the parent of the child. They are necessary, for instance, in order to include the grandfather and the grandmother and the guardian of a child. The expressions "chargeable" and "chargeability" are well-known expressions, and the Poor Law Acts from the time of the Poor Relief Act of 1601 distinguish between the liability to maintain and relief given, originally by churchwardens and overseers and now by the guardians, to a pauper who is unable to maintain himself. It is not, in my opinion, correct to say that the liability of the guardians of a union towards a pauper is a liability to maintain him so as to bring them within the definition of the word "parent" in s. 3 of the Elementary Education Act, 1870. There is a liability of the guardians to provide proper funds for the maintenance of a pauper when the pauper becomes chargeable; but I cannot construe the words "liable to maintain" as applicable to a board of guardians when it is obvious that those words were inserted for the purpose of including persons who are not parents in the ordinary sense, but who are undoubtedly liable to maintain the child. I think, therefore, that, if it had been intended by the Act of 1893, which specifically mentions boards of guardians in ss. 2 and 13, to make boards of guardians liable to contribute towards the expense of maintaining and educating a child in a case like the present, clearer words would have been used to indicate that intention. The education authority, acting under ss. 2 and 9 of the Act of 1893, boarded out and educated this child under an arrangement with the parent, who agreed to contribute towards the expenses thereof—an arrangement with which the board of guardians had nothing to do—and now that the parent is dead the education authority seek to make the board of guardians contribute. In my opinion the board of guardians are not "liable to maintain" this child within the definition of "parent" in s. 3 of the Act of 1870, and therefore cannot be called upon under s. 9 of the Act of 1893 to contribute towards the expenses of

the maintenance and education of the child. The appeal must be allowed.

BRAY J. I am of the same opinion. This is an application under s. 9 of the Elementary Education (Blind and Deaf Children) Act, 1893, for an order that the guardians of the Southwark Union are liable to contribute a weekly sum towards the expenses of a deaf child. Sect. 9 makes "the parent of the child" liable to contribute. There is no definition of the word "parent" in the Act of 1893, except by reference to the earlier Acts, s. 15 providing that "other expressions have, unless the contrary intention appears, the same meaning as in the Elementary Education Acts, 1870 to 1891." Accordingly it is necessary to see if the word "parent" is defined in any of those Acts, and I find in s. 3 of the Elementary Education Act, 1870, that "the term 'parent' includes guardian and every person who is liable to maintain or has the actual custody of any child." Taking the words "liable to maintain" in their ordinary and natural meaning, they seem to me to refer to a liability to maintain on the part of some person who stands for the time being in the position of a parent to the child. I have looked, as well as I have been able to do during the argument, through the Poor Law Acts to see if I can find anywhere in them the liability of the parish or of the board of guardians to provide for the relief of a pauper who has become chargeable described as a liability to maintain. I cannot find that expression used to describe such a liability. On the other hand, when the liability of a person standing in the position of a parent, a person other than the churchwardens and overseers of a parish or a board of guardians, is referred to, that is the expression used. For instance, in s. 6 of the Poor Relief Act, 1601, it is provided that "the father and grandfather, and the mother and grandmother, and the children of every poor old blind lame and impotent person, or other poor person not able to work, being of a sufficient ability, shall at their own charges relieve and maintain every such poor person"; whereas in s. 1, where the obligation of the churchwardens and overseers of the parish is specified, the word used is "relief." The next Act which I have looked at is the

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Poor Law Amendment Act, 1834, and I find it enacted in s. 57 that "every man who from and after the passing of this Act shall marry a woman having a child or children at the time of such marriage, whether such child or children be legitimate or illegitimate, shall be liable to maintain such child or children." When the question arises as to who is to pay for the cost of granting relief to a poor person s. 84 of the Act says that "the parish to which any poor person whose settlement shall be in question at the time of granting relief shall be admitted or finally adjudged to belong shall be chargeable with and liable to pay the cost and expense of the relief and maintenance of such poor person." The liability is not spoken of as a liability to maintain. I have no doubt that there are other Acts in which the same distinction is drawn. Therefore it seems to me that the words "liable to maintain" are not apt words to express the obligation imposed upon boards of guardians to grant relief. Still, it may be said that they are wide words and may include boards of guardians, and therefore I must look a little further. In the first place it is clear that there are persons to whom the expression "liable to maintain" will apply, as, for instance, grandfather and grandmother. Therefore there are persons to whom it will properly apply, and the words are properly inserted to include those persons. Further, I have looked through the Act of 1870—the Act which contains this definition of parent—and I cannot find that it deals with pauper children at all. There was no reason why it should deal with them, because they had already been dealt with by Poor Law Orders, and the guardians were bound to provide instruction for children under their charge. There was no occasion, therefore, to deal with such children or with boards of guardians at all. Again, there seems to be no intention of dealing with boards of guardians under s. 9 of the Act of 1893. Boards of guardians are mentioned specifically in other sections of the Act, and if the Legislature had intended that they should be persons liable under s. 9 to contribute towards the expenses of a blind or deaf child it would have specifically mentioned them. There seems to be no occasion to bring boards of guardians within s. 9, because, if this child was unable to maintain himself, as no doubt he was,

he would have become chargeable to the union and would have been placed under the care of the guardians, who would have educated him at their own expense at a school selected by them. It may be that they would have maintained and educated him at less expense than the education authority could do, though I do not know whether this is so or not. The respondents, as the education authority, have taken upon themselves the obligation of boarding him out. If they had not done this, the guardians would in all probability have had to take charge of him. There is no occasion, therefore, to construe s. 9 of the Act of 1893 as including boards of guardians.

For these reasons I am of opinion that the guardians of a union do not come within the word "parent" in s. 9 as being persons "liable to maintain" the child, and the appeal must therefore be allowed.

PICKFORD J. I agree. It seems to me that the words in s. 3 of the Elementary Education Act, 1870, "person who is liable to maintain," do not include a board of guardians upon whom the obligation to grant relief may fall, and that therefore the appellants here are not liable. A distinction seems to be drawn throughout the Poor Law Acts between a person who is liable to maintain another and the authority, whether the churchwardens and overseers of the poor or later on the guardians of a union, upon whom is imposed the obligation to grant relief to paupers. In my opinion the words "liable to maintain" are used in s. 3 of the Act of 1870 with reference to that liability to maintain which was perfectly well known and which was distinguished in the Poor Law Acts from the obligation to relieve. The appellants, therefore, are not liable.

Appeal allowed.

Solicitors for appellants: *Kingsford, Dorman & Co., for Hoar, Tatham & Whitehead, Maidstone.*

Solicitor for respondents: *E. Tanner.*

W. F. B.

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Jan. 19, 20, 21, 22;
April 25.

[IN THE COURT OF APPEAL.]

THE KING *v.* THE EARL OF CREWE.

Ex parte SEKGOME.

Habeas Corpus—Foreign Country in which the Crown has Jurisdiction—Protectorate—Foreign Jurisdiction Act, 1890 (53 *& 54 Vict. c.* 37)—*Order in Council — Proclamation — Validity—Arbitrary Arrest — Act of State—Person having Custody of Prisoner—Secretary of State for Colonies—"Foreign Dominion of the Crown"*—16 *Car.* 1, *c.* 10, *ss.* 6, 8—*Habeas Corpus Act*, 1862 (25 *& 26 Vict. c.* 20), *s.* 1.

By an Order in Council, dated May 9, 1891, made "in exercise of the powers by the Foreign Jurisdiction Act, 1890, or otherwise in Her Majesty vested," the High Commissioner for South Africa was authorized to exercise in the Bechuanaland Protectorate the powers of Her Majesty, and to do all such things "as are lawful," and to provide by proclamation for the administration of justice and generally for the peace, order, and good government of all persons within the Protectorate, including the prohibition and punishment of all acts tending to disturb the public peace.

One Sekgome, who claimed to be the chief of a native tribe in the Protectorate, was detained in custody at a place within the Protectorate by virtue of a proclamation authorizing his detention, and expressed to have been made by the High Commissioner, under the powers conferred on him by the Order in Council, on the ground that the detention of Sekgome was necessary for the preservation of peace within the Protectorate.

On an application by Sekgome for a writ of habeas corpus to the Secretary of State for the Colonies:—

Held (affirming an order of the Divisional Court dismissing the application), that the Protectorate was a foreign country in which His Majesty had jurisdiction within the meaning of the Foreign Jurisdiction Act, 1890; that the proclamation was validly made under the powers conferred by the Order in Council; and that the detention of Sekgome was, therefore, lawful.

Sprigg v. *Sigcau*, [1897] A. C. 238, distinguished.

Held, also, by Vaughan Williams and Kennedy L.JJ., that the Protectorate was not a "foreign dominion of the Crown" within s. 1 of the Habeas Corpus Act, 1862.

Quære, whether, in any event, the Secretary of State for the Colonies was a person having the custody of Sekgome to whom a writ of habeas corpus could be issued.

Appeal from an order of a Divisional Court discharging a rule nisi for a writ of habeas corpus.

By the rule nisi the defendant, the Earl of Crewe, His

Majesty's Secretary of State for the Colonies, was called upon to shew cause why a writ of habeas corpus should not issue directed to him to have the body of one Sekgome before the Court, upon the ground that Sekgome was unlawfully detained in custody at Gaberones, in the Bechuanaland Protectorate, South Africa, under the authority and with the sanction of the defendant.

In an affidavit sworn by the defendant it was stated that the Bechuanaland Protectorate was a foreign country within which His Majesty had power and jurisdiction by treaty, grant, usage, sufferance, or other lawful means, within the meaning of the Foreign Jurisdiction Act, 1890, and the territory of the Protectorate was foreign territory under His Majesty's protection; that it had never been acquired by settlement, or ceded to, or conquered, or annexed by His Majesty or any of his Royal predecessors, nor had His Majesty or any of his Royal predecessors recognized the same as, nor was it, part of his dominions, but he had power and jurisdiction within the same; that Sekgome was lawfully detained under a proclamation of December 5, 1906, by the High Commissioner for South Africa; and that, save in the sense that as Secretary of State having the superintendence on behalf of His Majesty's Government of the exercise of His Majesty's jurisdiction within the Protectorate the defendant was not prepared to advise His Majesty to approve of the policy of revoking the proclamation, Sekgome was not detained by him, nor had he the custody of Sekgome, and that the detention of Sekgome was an act of State for the preservation of the peace of the Protectorate and was not to be questioned by the Court.

The Proclamation of December 5, 1906, was in the following terms:—

"Whereas by an Order in Council of Her late Majesty dated the ninth day of May, 1891, the High Commissioner is empowered to provide for the peace, order, and good government of all persons within the limits of the said Order including the prohibition and punishment of acts tending to disturb the public peace;

"And whereas in that portion of the said limits which is known

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as the Bechuanaland Protectorate (hereinafter called the Protectorate) there has recently been a division amongst the tribe known as the Batawana respecting the question whether one Mathibe or one Sekgome is the true chief of the tribe which division was seriously endangering the peace of the tribe;

"And whereas in public and formal meeting of the tribe held in the presence of the Resident Commissioner of the Protectorate it was shown that Mathibe was the rightful chief of the tribe and a vast majority of the tribe accepted Mathibe as their lawful chief;

"And whereas the said Sekgome is at present outside the limits of the Batawana tribe and his return is a danger to the peace of the tribe and is likely to lead to bloodshed and tribal war;

"And whereas it has been necessary in order to preserve peace and order within the Protectorate to detain Sekgome at a place within the Protectorate distant from the limits of the Batawana tribe, and it is necessary to continue such detention;

"Now therefore in and by virtue of the powers in me vested aforesaid I do hereby declare and make known as follows:—

"1. All acts done, permitted to be done, or sanctioned by the Resident Commissioner with the approval of the High Commissioner with regard to the detention of the said Sekgome prior to the commencement of the proclamation are hereby declared legal and valid, and no proceedings shall be taken to question the legality or validity of any such acts.

"2. It shall be lawful for the High Commissioner to order the detention of the said Sekgome during His Majesty's pleasure in any suitable place within the Protectorate, and from time to time to change such place of detention, and also to deport the said Sekgome to any place without the Protectorate where provision shall have been made for his detention in lawful custody.

"3. A warrant under the hand of the High Commissioner addressed to the Resident Commissioner or any Assistant Commissioner of the Protectorate or to any person having charge of any station within the Protectorate shall be a sufficient authority for the person named in the warrant to detain the said Sekgome, or to convey the said Sekgome to the place named in the warrant,

and to deliver him into such custody as may be named in the said warrant.

"4. The said Sekgome may at any time during his detention within the Protectorate be removed from any one place of detention to any other place of detention therein by warrant under the hand of the High Commissioner duly addressed to any officer of the Protectorate, and the said Sekgome shall during his detention in any place named in any such warrant as aforesaid be under the lawful custody of the person named in the warrant as well as of the Assistant Commissioner within whose district the place named in the warrant is situated.

"5. No writ or process whatsoever calling in question the legality of the arrest detention or deportation of the said Sekgome, as the case may be, or any matter connected therewith, shall have any effect within the Protectorate.

"6. It shall be lawful for any police constable to arrest without warrant the said Sekgome if he shall at any time escape from custody, and any person aiding or attempting to aid the said Sekgome to escape or attempt to escape out of any lawful custody as aforesaid shall be guilty of an offence and shall be liable on conviction thereof to imprisonment with or without hard labour for any term not exceeding two years.

"7. This Proclamation shall commence and come into operation on the date of its publication in the Gazette."

The material portions of the Order in Council of May 9, 1891, and of certain other proclamations, and the facts relating to the detention of Sekgome are set out in the judgment of Vaughan Williams L.J.

The Divisional Court (Lord Alverstone C.J., Ridley and Darling JJ.) discharged the rule nisi on the grounds (1.) that there were courts of law in the Bechuanaland Protectorate which had jurisdiction to deal with the question of the legality of Sekgome's detention, and that under s. 1 of the Habeas Corpus Act, 1862 (1), the writ of habeas corpus ought therefore not to

(1) Habeas Corpus Act, 1862 (25 & 26 Vict. c. 20), s. 1: "No writ of habeas corpus shall issue out of England, by authority of any judge or court of justice therein, into any colony or foreign dominion of the Crown where Her Majesty has a lawfully established court or courts

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issue, and (2.) that the defendant was not the custodian of the body of Sekgome. The Court expressed no opinion as to the validity of the Proclamation of December 5, 1906.

Lush, K.C., and *Douglas Knocker*, for the appellant. First, the Proclamation of December 5, 1906, which, according to the contention of the Crown, makes lawful the detention of Sekgome, is invalid. It is a proclamation directed solely to the case of Sekgome, and it purports to authorize his detention without trial during His Majesty's pleasure, and it provides that no writ or process calling in question the legality of his arrest or detention shall have any effect in the Bechuanaland Protectorate. Sekgome is a British subject.

[*Rowlatt*, for the defendant. It is not admitted that he is a British subject, but for the purpose of this case it is immaterial whether he is or not.]

The proclamation is expressed to have been made by the High Commissioner under the powers conferred upon him by an Order in Council of May 9, 1891, which by art. 2 authorized the High Commissioner, on Her Majesty's behalf, to do all such things in the Bechuanaland Protectorate "as are lawful," and as he may think expedient, subject to instructions from a Secretary of State; and the High Commissioner is by art. 4 empowered to legislate by proclamation for the administration of justice, the raising of revenue, "and generally for the peace, order and good government of all persons" within the Protectorate, "including the prohibition and punishment of acts tending to disturb the public peace." The Proclamation of December 5, 1906, can only be justified if, as was pointed out by Lord Watson in *Sprigg* v. *Sigcau* (1), the true construction of the Order in Council is that it gives the High Commissioner the powers of "an irresponsible sovereign or a supreme and unfettered Legislature." But the Order in Council has not that effect; it does not confer on the High Commissioner the arbitrary powers of a despot, for his powers are expressly limited to such acts "as are lawful," which means

of justice having authority to grant and issue the said writ, and to ensure the due execution thereof throughout such colony or dominion."

(1) [1897] A. C. 238, at p. 246.

that he is only to have such powers as a constitutional sovereign can exercise or transfer, and the Crown cannot authorize the High Commissioner to declare a particular individual to be an outlaw. By a Proclamation dated June 10, 1891, issued under this Order in Council, elaborate provision was made for the appointment of commissioners and magistrates to hold Courts of law in the Protectorate, and a Proclamation dated September 14, 1906, repealing a similar Proclamation of June 13, 1891, provided in express terms for the steps to be taken for the apprehension or expulsion of persons endangering the peace. There having been that which is equivalent to a constitution granted by these proclamations to the Protectorate, it is not in the power of the High Commissioner, or even of the Crown, to revoke that constitution in the case of one particular person, as is sought to be done in the case of Sekgome by the Proclamation of December 5, 1906: *Campbell* v. *Hall.* (1) A subsequent proclamation which in the case of an individual overrides all the previous proclamations and is contrary to natural justice is not "lawful" within the meaning of the Order in Council. If the High Commissioner was intended to have these practically unlimited powers, the word "lawful" would not have been used. [They also referred to *Mostyn* v. *Fabrigas* (2) and *Walker* v. *Baird.* (3)]

Secondly, it is said, and the Divisional Court has held, that there are Courts in the Protectorate competent to deal with the question of the legality of Sekgome's detention, and that, therefore, s. 1 of the Habeas Corpus Act, 1862, prevents the issue of the writ out of England. There have been several proclamations by the High Commissioner creating Courts of resident commissioners and magistrates and defining their powers and jurisdiction, but an examination of these proclamations fails to shew that there is any Court in the Protectorate which has power to grant habeas corpus, for they are all inferior Courts; and even if there were a Court with that power, an application to it would be fruitless in this case, because the Proclamation of December 5, 1906, expressly provides that no

(1) (1774) 1 Cowp. 204. (2) (1774) 1 Cowp. 161.
(3) [1892] A. C. 491.

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writ questioning the legality of Sekgome's detention shall have any effect within the Protectorate, and although the validity of that proclamation can be questioned in this Court, it would be binding on the local Court. Further, if, as the Crown contends, the Protectorate is foreign territory, it is not "a colony or foreign dominion of the Crown" within s. 1 of the Act of 1862, and, therefore, that Act does not apply to this case; and in any case this application is for the writ to issue, not to a foreign dominion of the Crown, but to the defendant in this country. The contention of the appellant, however, is that Gaberones is not foreign territory, but is part of territory owned by the Crown by virtue of an Order in Council of May 16, 1904.

Thirdly, the application for a habeas corpus addressed to the Earl of Crewe is rightly conceived. The writ lies to a person who really has the authority and control over the detention of the prisoner: *Barnardo* v. *Ford.* (1) The Earl of Crewe has that authority and control. It is not material that, technically and in point of form, he may not be the employer or principal or superior officer of the person actually detaining the prisoner. It is not essential that the person to whom the writ is addressed should be, either actually or constructively, the custodian of the prisoner; it is sufficient that he should be the person who has the power of determining whether the detention of the prisoner should or should not continue. The theory of the writ is that the sovereign, acting through his judges as he acts in other matters through his ministers, requires information, and communicates his wishes, with regard to the matter of the detention of the prisoner, from and to the person who has in fact control over that detention: see Bacon's Abridgment, Habeas Corpus B. (6.); *Rex* v. *Wilkes* (2); *Rex* v. *Pell.* (3) In *Carus Wilson's Case* (4) the writ was addressed to the Viscount, as well as to the gaoler, of Jersey, though clearly the prisoner was not then in the custody of the Viscount, presumably because the Viscount had authority over the gaoler in regard to the prisoner's detention. The defendant does not allege that he has not power to order the prisoner's release, but sets up the proclamation, which, according

(1) [1892] A. C. 326.
(2) (1763) 2 Wils. 151.
(3) (1674) 3 Keb. 279.
(4) (1845) 7 Q. B. 984.

to the appellant's contention, was illegal. It is clear that the writ of habeas corpus may be issued in respect of a foreigner detained in this country: *Ex parte Besset* (1); the *Case of the Hottentot Venus.* (2) The writ goes to any part of the dominions of the Crown: *Rex* v. *Cowle* (3); *Ex parte Anderson* (4); *Crowley's Case.* (5) It may be questionable whether the appellant owes any allegiance to the Crown, but if he owes obedience to the Crown he is entitled to the protection of our law; and the Crown has de facto assumed the power to collect revenue in the Protectorate and to police the country, and has proclaimed that the laws applicable therein shall be those of Cape Colony. [They also referred to 16 Car. 1, c. 10, s. 6, *Wolfe Tone's Case* (6), *The Earl of Danby's Case* (7), *Reg.* v. *Barnardo* (*Tye's Case*) (8), and *Reg.* v. *Barnardo* (*Gossage's Case*). (9)]

Rowlatt (*Sir W. S. Robson, A.-G.*, with him), for the defendant. A writ of habeas corpus cannot in this case be addressed to the Earl of Crewe, because he is not, as Secretary of State for the Colonies, the superior officer of the person actually having the custody of the prisoner. He is the minister who by the Constitution exercises the function of advising the Crown on colonial matters; but it does not follow from the fact that he holds an office which gives him power to set at work a chain of causes, the ultimate result of which may be the release of the prisoner, that a writ of habeas corpus can be addressed to him as if he were the custodian of the prisoner. The case of Bechuanaland is analogous in this respect to that of a native Indian dependency, the British Resident of which could not be looked upon as the custodian of a prisoner confined there, merely because he could take such action as might probably in the long run procure the prisoner's release. The Earl of Crewe is not the author of, or responsible for, Sekgome's imprisonment. *Carus Wilson's Case* (10) is no authority for addressing the writ in the present case to the Earl of Crewe. In that case it is stated (11) that it was the

(1) (1844) 6 Q. B. 481.
(2) (1810) 13 East, 195.
(3) (1759) 2 Burr. 834.
(4) (1861) 3 E. & E. 487; 30 L. J. (Q.B.) 129.
(5) (1818) 2 Swanst. 1.
(6) (1798) 27 St. Tr. 613.
(7) (1682) 11 St. Tr. 831.
(8) (1889) 23 Q. B. D. 305.
(9) (1890) 24 Q. B. D. 283.
(10) 7 Q. B. 984.
(11) 7 Q. B. at p. 990.

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duty of the Viscount of Jersey, or his deputy, to execute the sentence of the Court, and therefore he was responsible for the imprisonment of the prisoner. The same consideration applies to the case of *Rex* v. *Pell.* (1) The Secretary of State could advise the Crown to cause the proclamation with regard to Sekgome's detention to be withdrawn, but he could not order it to be withdrawn of his own authority. The fact that he could so advise the Crown does not make him the detainer or responsible for the detention of Sekgome. If he went out to Bechuanaland in person and directed the custodian of the prisoner to deliver him up for production in this country, the custodian might refuse to do so. All kinds of proceedings might be taken against the Secretary of State if he is to be assumed to be responsible for the doing of anything the undoing of which he might, as Secretary of State, procure. The duty of the Secretary of State is an advisory duty as between himself and the Crown only: *Gidley* v. *Lord Palmerston.* (2) A capias may still be issued for a Crown debt, but it could not be said that, because the Lords of the Treasury could no doubt take such steps as would cause a man taken under such a capias to be released, a habeas corpus could therefore be addressed to them on the ground that the capias was bad.

Secondly, with regard to the alleged invalidity of the Proclamation of December 5, 1906, the Order in Council empowers the High Commissioner to legislate for the Protectorate by proclamation, and all the proclamations made by him, including the Proclamation of December 5, 1906, stand in the position of Acts of Parliament.

[VAUGHAN WILLIAMS L.J. Is it clear that the Proclamation of December 5 can be treated as legislation? It appears in effect to be a proclamation that a particular individual shall not have the benefit of the law as declared by the former proclamations, which by the hypothesis were legislation and still stand good.]

It is analogous to a Bill of Attainder or an Act of Indemnity, such as was passed in the case of Governor Eyre with regard to his action in Jamaica. The High Commissioner is placed in the position of legislator for the Protectorate of Bechuanaland by

(1) 3 Keb. 279. (2) (1822) 3 Brod. & B. 275.

virtue of statute. The Foreign Jurisdiction Act, 1890, consolidates previous Acts dealing with the same matter. At common law the Crown had no power of territorial legislation outside the dominions of the Crown. There might be power to make certain laws binding on British subjects abroad, but there was no power to make territorial law outside the Crown's dominions. The object of the statute is to enable the Crown, in cases where by treaty, capitulation, grant, usage, sufferance, or other lawful means the Crown has jurisdiction in a foreign country, to exercise legislative and other territorial jurisdiction therein by putting such a country for that purpose on the same footing as territory in which the Crown has acquired such jurisdiction by cession or conquest, and the position with regard to such territory is that the Crown can legislate by Orders in Council. The Order in Council of May 16, 1904, only affects the ownership of the soil, and has nothing to do with the question of sovereignty. Assuming the Bechuanaland Protectorate to be a foreign country to which the Act of 1890 applies, as to which Lord Crewe's affidavit is conclusive, the Crown is not bound to legislate for it itself, but may set up a Legislature there to perform its functions in that respect. By s. 9 of the Act the Crown may by Order in Council assign to any Court in any British possession, or held under the authority of His Majesty, any jurisdiction, civil or criminal, original or appellate, which may lawfully by Order in Council be assigned to any British Court in any foreign country. There were dicta to the effect that the Crown could not revoke a constitution or legislation once established by it in a colony. Sect. 10 prevents the application of that doctrine in cases within the Act by enacting that an Order in Council made under the Act may be revoked or varied by Order in Council. By s. 11 Orders in Council made in pursuance of the Act are to be laid before both Houses of Parliament and are to have the same effect as if enacted in the Act. Sect. 12 provides (1.) that, if any Order in Council, made in pursuance of the Act as respects any foreign country, is in any respect repugnant to the provisions of an Act of Parliament extending to the subjects of the Crown in that country, or any order or regulation made under the authority of

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any such Act or having in that country the force of any such Act, it shall be read subject to that Act, order, or regulation, and shall to the extent of such repugnancy, but not otherwise, be void; but that (2.) an Order in Council made in pursuance of the Act shall not be void on the ground of repugnancy to the law of England, unless it is repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid. In *Staples* v. *The Queen* (1), where there was a petition to the Privy Council in 1898 for leave to appeal by a man convicted in Buluwayo under an Order in Council which provided for the trial of offences by a judge and assessors without a jury, on the ground that Rhodesia was British territory, and that this provision of the Order in Council was repugnant to statutes extending to the subjects of the Crown in that country, the petition was dismissed without any formal judgment being given, but the Court repeatedly said in the course of the arguments that the territory was for this purpose not British, but foreign, and that the Order in Council there in question was therefore valid under the Act of 1890. Art. 2 of the Order in Council of May 9, 1891, gives to the High Commissioner power to exercise the executive powers of the Crown in the Protectorate, and for that purpose to do all such things "as are lawful," which means according to the law which governs all British subjects wherever they may be, such as the law forbidding slavery. It is not contended that that article, if it stood alone, would justify the detention of Sekgome. It would not give power to imprison a man apart from any process of law, but art. 4 empowers the High Commissioner to provide for the administration of justice, and "generally for the peace, order and good government of all persons" in the Protectorate. In dealing with this Order in Council it must be observed that the power of the Crown in a conquered country is not limited to the prerogative rights which the Crown has in this country, but is the power of a conqueror: *Phillips* v. *Eyre*. (2) Here the Crown has delegated the power of legislation to the High Commissioner, and the contention for the Crown is that the latter is in the position of an unfettered legislator, except so far as he is expressly

(1) Unreported. (2) (1869) L. R. 4 Q. B. 225; (1870) L. R. 6 Q. B. 1.

fettered by previous statutes, and so far as subsequent statutes may disallow any of his legislation. There is no real danger involved in this, for he is subject to the authority of Parliament, and the Secretary of State can control his action. The power to make laws with the object of securing order, peace, and good government covers the whole sphere of government, and includes power to make provisions dealing with an individual and his rights, so far as may be necessary for that object, even to the extent of his detention without trial, as has been done in the case of Sekgome by the Proclamation of December 5, 1906; for, as was said by Lord Halsbury in *Riel* v. *The Queen* (1) in construing similar words in s. 2 of the British North America Act, 1871 (34 & 35 Vict. c. 8), "they are words under which the widest departures from criminal procedure as it is known and practised in this country have been authorised in Her Majesty's Indian Empire."

The provision in s. 12 of the Act of 1890 as to Orders in Council, being void for repugnancy, is the only limitation on this power of legislation, and that section must be taken to have superseded the dictum of Lord Mansfield in *Campbell* v. *Hall* (2) as to the inability of the sovereign to make a change in a conquered country which is "contrary to fundamental principles": see the observations of Willes J. in *Phillips* v. *Eyre.* (3) *Sprigg* v. *Sigcau* (4) is not an authority against the contention of the Crown, for the decision in that case proceeded on the ground that the statute in question, the Pondoland Annexation Act, 1894, did not confer the authority of an unfettered Legislature, whereas the argument here is that the Order in Council of May 9, 1891, has that effect.

Thirdly, although the Bechuanaland Protectorate is, it is contended, a foreign country within the meaning of the Foreign Jurisdiction Act, 1890, that does not necessarily prevent the application of the Habeas Corpus Act, 1862. Prima facie the writ of habeas corpus runs in the Crown's dominions. For the purpose of habeas corpus dominion cannot be judged by the same test as it is in the Foreign Jurisdiction Act, 1890.

(1) (1885) 10 App. Cas. 675, at p. 678.
(2) 1 Cowp. 204.
(3) L. R. 6 Q. B. at p. 20.
(4) [1897] A. C. 238.

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Any territory in which the Crown's writ of habeas corpus runs is part of the Crown's dominions for that purpose, and if there were no Court in the particular place competent to issue the writ the old jurisdiction of the King's Bench to do so possibly still exists. The question, therefore, which arises on the Act of 1862 is whether there is a Court in the Protectorate with power to issue the writ. The Divisional Court has rightly held that on the true construction of the proclamations of the High Commissioner creating Courts of law in the Protectorate, and in particular a Proclamation of February 11, 1896, which gave to assistant commissioners and resident magistrates jurisdiction in all civil and criminal suits and proceedings over and against all persons within their districts, there are Courts in the Protectorate which have jurisdiction in habeas corpus. On an application to one of those Courts for the issue of the writ, the Court would have power to deal with the question of the validity of the Proclamation of December 5, 1906, and an appeal would lie from its decision to the Privy Council. In the Courts of a country where there is a subordinate Legislature, as distinguished from an Imperial Legislature, the Courts are bound to inquire into the validity of every enactment of that subordinate Legislature: *Powell* v. *Apollo Candle Co.* (1); *Reg.* v. *Burah.* (2)

Lush, K.C., replied.

[The following authorities were also referred to:—*Forester* v. *Secretary of State for India* (3); *Rickebie's Case* (4); *Picton's Case* (5); Bryce's Constitution of the United States, vol. 1, p. 494; *L'Union St. Jacques de Montreal* v. *Bélisle* (6); *Dow* v. *Black* (7); *Ex parte Carew* (8); *Anonymous.* (9)]

Cur. adv. vult.

April 25. VAUGHAN WILLIAMS L.J. read the following judgment:—This is an appeal against an order of the Lord Chief

(1) (1885) 10 App. Cas. 282.
(2) (1878) 3 App. Cas. 889.
(3) (1872) L. R. Ind. Ap. (Sup. Vol.) 10.
(4) (1642) March, 213.
(5) (1804-1812) 30 St. Tr. 225, at pp. 746, 865, 946.
(6) (1874) L. R. 6 P. C. 31.
(7) (1875) L. R. 6 P. C. 272.
(8) [1897] A. C. 719.
(9) (1700) 1 Salk. 350.

Justice, Ridley and Darling JJ., as a Divisional Court of the King's Bench Division, discharging an order of October 29, 1909, calling upon the Earl of Crewe, His Majesty's Secretary of State for the Colonies, to shew cause why a writ of habeas corpus should not issue directed to him to have the body of one Sekgome Letsholathibe, the hereditary chief of the Batawana tribe, before this Court.

The Attorney-General, in the course of his argument, raised various contentions, including the contention that the detention of Sekgome was justified under the terms of a Proclamation by his Excellency the High Commissioner (No. 25, 1906, dated December 5, 1906), and, in answer to this, it was argued by counsel on behalf of Sekgome that this proclamation was invalid and of no effect; but the Lord Chief Justice and the other judges of the King's Bench Division gave no judgment, and expressed no definite opinion, upon this point, and based their judgment in discharging the rule exclusively on two grounds, namely, (1.) on the ground that, under the Habeas Corpus Act of 1862, no habeas could issue out of England by authority of any judge or Court of justice therein into any colony or foreign dominion of the Crown where His Majesty has a lawfully established Court or Courts of justice having authority to grant and issue the said writ, and to ensure the due execution thereof throughout such colony or dominion, and that there was shewn on the affidavits before the Court to be a Court in existence in the Protectorate of British Bechuanaland which has authority to grant and issue a writ of habeas corpus with the consequential right of appeal; (2.) upon the ground that the Secretary of State is not the custodian of the body of Sekgome.

I think it is convenient, before reviewing in any way the judgment of the Divisional Court as based on these two grounds, that I should say something as to the history of this case appearing on the facts proved by the affidavits, and should set forth, sufficiently for their comprehension, the contentions on behalf of the Crown and on behalf of Sekgome, and should not limit myself to such facts only as are relevant to the grounds upon which the decision of the Divisional Court discharging the rule is based.

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Sekgome is a native of South Africa who, prior to the year 1906, was for a number of years, during the minority of his nephew, one Mathibe, the acting chief of the tribe of Batawana, a tribe living in the country surrounding Lake Ngami, in the Bechuanaland Protectorate. In December, 1905, a petition was presented by certain members of the tribe to the resident commissioner at Mafeking alleging that Sekgome was not, according to their native laws, the real heir to the chieftainship and asking for his deposition in favour of his nephew Mathibe. The High Commissioner refused to accede to the prayer contained in the petition or to interfere in the matter, but while Sekgome was absent in Kimberley—as the Crown asserts, on his own private business, or, as Sekgome's friends assert, by the orders of the High Commissioner—the tribe rose against him and invited Mathibe to assume the chieftainship. At the same time the adherents of Sekgome sent messages to him to return at once to the tribe, and the High Commissioner, fearing bloodshed and loss of life, not merely among the natives, but also among the white men living in the district, instructed the resident commissioner to proceed to Tsau, the chief village of the tribe, and inquire into the matter. A public inquiry was held on June 11 and 12, 1906, and on the question whether according to the law of the tribe Sekgome or Mathibe was entitled to the chieftainship of the assembled tribesmen the count was largely in favour of Mathibe. Thereupon the resident commissioner, after considering evidence as to the descent of the rivals, publicly stated that he was of opinion that the claim of Mathibe was established, and the High Commissioner, fearing that the return of Sekgome would be attended by bloodshed and loss of life, refused to permit Sekgome to return to the district of the tribe, but Mathibe, who had been forbidden to enter the district, was permitted to return and take up his duties as chief of the tribe. Sekgome, on the other hand, was invited to take up his residence in some other district in South Africa. This Sekgome refused to do, and the High Commissioner made the Proclamation of December 5, 1906, which, after reciting that it has been necessary in order to preserve peace and order within the Protectorate to detain Sekgome, provides inter alia (1.) for indemnification of the resident commissioner

in connection with the detention of Sekgome; (2.) for future detention and deportation of Sekgome by order of the High Commissioner; and (5.) prohibits any process questioning the legality of Sekgome's arrest, detention, or deportation to have effect in the Protectorate. It is under this proclamation that the detention of Sekgome was justified. It is plain on these facts that, if the Court has to deal with the question of the validity of the Proclamation of December 5, 1906, the history of the Protectorate, its legislative and judicial system, will require investigation; but, inasmuch as the King's Bench Division discharged the rule for a habeas on what may be called preliminary objections based, one on the effect of the Act of 1862 as preventing a writ of habeas corpus issuing from England into the Protectorate, and the other based on the address of the writ to Lord Crewe, who is not the custodian of the body of Sekgome, whose body is sought to be brought before the English Courts, I will discuss at once these matters.

The statute of 1862 (25 & 26 Vict. c. 20) recites: "Whereas it is expedient that writs of habeas corpus should not issue out of England into any colony or foreign dominion of the Crown where Her Majesty has a lawfully established court or courts of justice having authority to grant and issue the said writ," (writ of habeas corpus) "and to ensure the due execution thereof throughout such colony or foreign dominion: Be it therefore enacted . . . . as follows: Sect. 1. No writ of habeas corpus shall issue out of England by authority of any judge or court of justice therein into any colony or foreign dominion of the Crown where Her Majesty has a lawfully established court or courts of justice having authority to grant and issue the said writ and to ensure the due execution thereof throughout such colony or dominion. Sect. 2. Provided that nothing in this Act contained shall affect or interfere with any right of appeal to Her Majesty in Council now by law existing." On the whole I have come to the conclusion that this Act has no effect in the Protectorate as preventing the issue into the Protectorate of a writ of habeas, because, as I construe the Act, it applies only to the territorial dominions of the Crown. Looking at the words of the Act of 1862, I think that the last words of s. 1—"and to ensure the

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due execution thereof throughout such colony or dominion"—are an indication that the Legislature intended by the word "dominion" territorial dominion, and not dominion in the sense of power. Again, I do not think that the words "foreign dominion" in the Act of 1862 mean, or apply to, any country or place out of His Majesty's dominions, which is the sense in which the word "foreign" is used in the Foreign Jurisdiction Act of 1890. In *Ex parte Anderson* (1) no doubt seems to have been entertained as to the power of the Court at Westminster to issue a writ of habeas to go to any place under the subjection of the Crown of England whenever it is suggested to the Court that a subject of the Crown is illegally imprisoned. The only doubt seems to have been as to the propriety of the issuing of such a writ to Canada, a colony where separate jurisdiction has been established. The statute of 1862 seems to have been passed merely for the purpose of abrogating the jurisdiction of the Courts at Westminster in favour of colonial independence by declaring that no writ of habeas shall issue out of England into a colony or foreign dominion where the Crown has a Court of justice having authority to grant and issue such writ and to ensure throughout such colony or dominion due execution thereof. I cannot, therefore, agree that the rule for a habeas should be discharged on this ground.

As to the second preliminary objection on which the discharge of the rule for a habeas was based by the Divisional Court, namely, that Lord Crewe, to whom the rule nisi is addressed, has not the custody of the body of Sekgome, I am by no means satisfied, having regard to the statute 16 Car. 1, c. 10, ss. 6 and 8, that a writ of habeas must necessarily be addressed to the governor of the gaol or gaoler or other the official in command of the gaol, and in that sense having the actual custody of the imprisoned person claiming to be entitled to the protection of the writ of habeas corpus. I am disposed rather to say that the writ may be addressed to any person who has such control over the imprisonment that he could order the release of the prisoner. Lord Alverstone C.J., in dealing with this point, says: "I think this point fails and that in practice and under the recognized

(1) 3 E. & E. 487; 30 L. J. (Q.B.) 129.

rules applicable to habeas corpus the writ should go to the gaoler or custodian of the body that is supposed to be desired to be brought up." Later on he says: "Now I cannot think we should be justified, where there is a proper tribunal to investigate this matter, in sending a writ of habeas corpus to a minister of the Crown because he is responsible for advice given but is not responsible for the actual custody." I understand the Lord Chief Justice to mean by the words "where there is a proper tribunal to investigate this matter" where there is an existing Court having authority to grant and issue a writ of habeas and to ensure the execution thereof in the Protectorate. I am by no means satisfied that there is in the Protectorate such a Court. Later again he says: "In my opinion he (Sekgome) can get his release if by going to a competent Court that Court decides that his detention is unlawful. It seems to us that to come to this Court and ask us to issue to the Secretary of State a writ of habeas corpus on the ground that he in the exercise of his discretion is not prepared to advise His Majesty that the order under which he was detained ought to be done away with would be stretching the law of habeas corpus to an extent to which in my opinion it never has gone." The Chief Justice does not expressly say what his view would have been as to addressing the writ to the Secretary of State if he had come to the conclusion that there was no Court in the Protectorate competent to issue and enforce a writ of habeas.

As I have come to the conclusion, which I shall presently express, that the proclamation under which Sekgome is detained is valid, and that his detention is lawful, it is not necessary for me to determine this point, but even if, as I am inclined to think, a writ could not properly be addressed to the Secretary of State in a case where a writ of habeas could properly be issued in England into the Protectorate, I should, as at present advised, not be prepared to hold that a writ could not be properly addressed to the High Commissioner as having control of the imprisonment of Sekgome, or to the gaoler of the prison in the Protectorate where Sekgome is detained.

With regard to the address of the writ to the gaoler, I regret that the advisers of the Crown refused to consent, on our

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suggestion, to the amendment of the writ by the addition of the name of the gaoler, but there may have been good reasons for the refusal, as to which I am not in a position to express an opinion.

Having dealt with these preliminary questions, I will now pass to the discussion of the question of the validity of the proclamation. The first statute to which I will call attention is the Foreign Jurisdiction Act, 1890, which recites: "Whereas by treaty, capitulation, grant, usage, sufferance, and other lawful means, Her Majesty the Queen has jurisdiction within divers foreign countries, and it is expedient to consolidate the Acts relating to the exercise of Her Majesty's jurisdiction out of her dominions: Be it therefore enacted . . . . as follows: Sect. 1. It is and shall be lawful for Her Majesty the Queen to hold, exercise, and enjoy any jurisdiction which Her Majesty now has or may at any time hereafter have within a foreign country in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory. Sect. 2. Where a foreign country is not subject to any government from whom Her Majesty might obtain jurisdiction in the manner recited by this Act, Her Majesty shall by virtue of this Act have jurisdiction over Her Majesty's subjects for the time being resident in or resorting to that country, and that jurisdiction shall be jurisdiction of Her Majesty in a foreign country within the meaning of the other provisions of this Act. Sect. 3. Every act and thing done in pursuance of any jurisdiction of Her Majesty in a foreign country shall be as valid as if it had been done according to the local law then in force in that country. Sect. 4. If in any proceeding, civil or criminal, in a court in Her Majesty's dominions, or held under the authority of Her Majesty, any question arises as to the existence or extent of any jurisdiction of Her Majesty in a foreign country a Secretary of State shall on the application of the court send to the court within a reasonable time his decision on the question, and his decision shall for the purposes of the proceeding be final (2.) The court shall send to the Secretary of State, in a document under the seal of the court, or signed by a judge of the court, questions framed so as properly to raise the question, and sufficient answers to those questions shall be returned by the

Secretary of State to the court, and those answers shall, on production thereof, be conclusive evidence of the matters therein contained. Sect. 5. (1.) It shall be lawful for Her Majesty the Queen in Council, if she thinks fit, by order to direct that all or any of the enactments described in the First Schedule to this Act, or any enactments for the time being in force amending or substituted for the same, shall extend, with or without any exceptions, adaptations, or modifications in the order mentioned, to any foreign country in which for the time being Her Majesty has jurisdiction. (2.) Thereupon those enactments shall, to the extent of that jurisdiction, operate as if that country were a British possession, and as if Her Majesty in Council were the Legislature of that possession." Sect. 6 is to the effect that where a person is charged with an offence cognizable by a British Court in a foreign country any person having authority derived from Her Majesty in that behalf may send persons charged with offences for trial to a British possession. "Sect. 8. Where by Order in Council made in pursuance of this Act any British court in a foreign country is authorized to order the removal or deportation of any person from that country, that removal or deportation, and any detention for the purposes thereof, according to the provisions of the Order in Council, shall be as lawful as if the order of the court were to have effect wholly within that country." Sect. 9 gives power to confer on any Court in any British possession any jurisdiction, civil or criminal, original or appellate, which may lawfully by Order in Council be conferred on any British Court in any foreign country. Sect. 11 provides for the laying before Parliament of Orders in Council, which thereupon shall have effect as if enacted in this Act. Sect. 12 avoids Orders in Council for repugnance with the provisions of Acts of Parliament extending to Her Majesty's subjects in protectorates. "Sect. 16. In this Act,—The expression 'foreign country' means any country or place out of Her Majesty's dominions. The expression 'British court in a foreign country' means any British court having jurisdiction out of Her Majesty's dominions in pursuance of an Order in Council whether made under any Act or otherwise. The expression 'jurisdiction' includes power."

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I have read the observations of Mr. W. E. Hall upon p. 221 of his book on Foreign Jurisdiction of the British Crown, in which he says that it is doubtful whether this Act, or any of the prior Acts relating to foreign jurisdiction, deal with anything else than a strictly extra-territorial jurisdiction limited to His Majesty's own subjects. I think that the power given by s. 5 of the Act of 1890 to extend the operation of certain repealed enactments in the First Schedule to any foreign country in which for the time being Her Majesty has jurisdiction as if the country were a British possession, and as if Her Majesty in Council were the Legislature of the possession, rather favours the limitation of the statute to Her Majesty's subjects suggested by Mr. Hall; and I think that ss. 2 and 12 recognize this limitation of extra-territorial jurisdiction to Her Majesty's subjects. I think, however, that the interpretation which has been acted upon for so many years in Orders of Council and the proclamations thereunder applying the provisions of the Foreign Jurisdiction Act, 1890, to natives of such foreign countries as well as to British subjects resident in or resorting to such foreign country makes it impossible now to adopt the interpretation suggested by Mr. Hall. Before leaving the consideration of this statute it is as well to consider paragraph 4 of the affidavit of Lord Crewe: "The Bechuanaland Protectorate is a foreign country within which His Majesty has power and jurisdiction by treaty, grant, usage, sufferance, or other lawful means within the meaning of the Foreign Jurisdiction Act, 1890. The territory of the said Protectorate is foreign territory under His Majesty's protection. It has never been acquired by settlement or ceded to or conquered or annexed by His Majesty, or any of his Royal predecessors, nor has His Majesty, or any of his Royal predecessors, recognized the same as, nor is it, part of his dominions, but he has power and jurisdiction within the same." It is also necessary to bear in mind when considering the effect and validity of proclamations that the Act of 1890, while recognizing the authority of the Queen in Council, specifies, in respect of certain subjects, powers which it shall be lawful for the Crown to exercise by Order in Council, and then by s. 11 provides that "every Order in Council made in pursuance of

this Act shall be laid before both Houses of Parliament forthwith after it is made, if Parliament be then in session, and if not, forthwith after the then next session of Parliament, and shall have effect as if it were enacted in this Act"; and then by s. 12 enacts that "(1.) if any Order in Council made in pursuance of this Act as respects any foreign country is in any respect repugnant to the provisions of any Act of Parliament extending to any of Her Majesty's subjects in that country, or repugnant to any order or regulation made under the authority of any such Act of Parliament, or having in the country the force and effect of any such Act, it shall be read subject to that Act, order, or regulation, and shall to the extent of such repugnancy, but not otherwise, be void. (2.) An Order in Council made in pursuance of this Act shall not be, or be deemed to have been, void on the ground of repugnancy to the law of England unless it is repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid." I gather from the words of the Lord Chancellor in *Staples* v. *The Queen* (1) that the Act of Parliament referred to in s. 12 is an Act of Parliament expressly dealing with Her Majesty's subjects in that country, and not an Act of Parliament such as the Magna Charta, which, of course, does not deal with that country.

I will now deal with the Orders in Council and proclamations so far as material. The Order in Council of May 9, 1891, begins with a recital of the words of the Foreign Jurisdiction Act, 1890 (I may mention, perhaps, here that the whole of Bechuanaland and the Bechuanaland Protectorate were down to 1885 a Protectorate, and then in 1885 part of the Bechuanaland Protectorate was turned into British Bechuanaland, and what was not turned into British Bechuanaland is the part now that is the Protectorate): "Whereas by treaty, grant, usage, sufferance, and other lawful means, Her Majesty has power and jurisdiction in the said territories" (namely, territories limited by the Order which admittedly include the Protectorate); and concludes with these words: "Now therefore Her Majesty by virtue and in exercise of the powers by the Foreign Jurisdiction Act, 1890, or otherwise in Her Majesty vested, is pleased by and with the

(1) Judicial Committee, 1899, unreported.

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advice of her Privy Council to order, and it is hereby ordered as follows:—" Sect. 1 defines the territorial limits of the Order, and s. 2 enacts that "the High Commissioner may on Her Majesty's behalf exercise all powers and jurisdiction which Her Majesty at any time before or after the date of this Order had or may have within the limits of this Order, and to that end may take or cause to be taken all such measures, and may do or cause to be done all such matters and things within the limits of this Order as are lawful, and as in the interest of Her Majesty's service he may think expedient, subject to such instructions as he may from time to time receive from Her Majesty or through a Secretary of State." Much argument was addressed to us by Mr. Lush on the meaning of the word "lawful" in the above-cited section, which, he argued, intended the personal prerogative of the Sovereign. In my opinion "lawful" in this Order in Council means lawful in the sense of consistent with the Foreign Jurisdiction Act, 1890, which, it will be observed, limits to a considerable degree, notably by s. 12, amongst other sections, the power of legislation by proclamation. Then follows s. 3, which enables the High Commissioner to appoint deputy commissioners, resident commissioners, assistant commissioners, judges, magistrates, or other officers and to define their duties, and authorizes such officers to exercise such powers as the High Commissioner may assign to them, subject to the directions of the High Commissioner from time to time; and further provides that the appointment of such officers shall not abridge, alter, or affect the right of the High Commissioner to execute and discharge all the powers by the Act conferred upon him. Sect. 4 enables the High Commissioner "by proclamation" from time to time to "provide for the administration of justice, the raising of revenue, and generally for the peace, order and good government of all persons within the limits of this Order, including the prohibition and punishment of acts tending to disturb the public peace"; and provides that "the High Commissioner in issuing such proclamation shall respect any native laws or customs by which the civil relations of any native chiefs, tribes, or populations under Her Majesty's protection are now regulated, except so far as the same may be incompatible with the due exercise of

Her Majesty's power and jurisdiction." Sect. 5 provides for the proclamation being published in the Gazette and continuing in force until disallowed. Sect. 6 enacts that "Her Majesty may disallow any such proclamation wholly or in part, and may signify such disallowance through a Secretary of State, and upon such disallowance being publicly notified by the High Commissioner in the Gazette the provisions so disallowed shall, from and after a date to be mentioned in such notification, cease to have effect, but without prejudice to anything theretofore lawfully done thereunder." This section goes to negative permanency in the system of laws accorded to the Protectorate and to exclude the application of the fourth and sixth rules laid down by Lord Mansfield in *Campbell* v. *Hall*. (1) In fact, however, no such disallowance has been notified in respect of the Proclamation of September 14, 1906, dealing with persons ordered to leave the Protectorate as being dangerous to peace and order, a proclamation which would seem to govern Sekgome's case. Sect. 7 provides for the exercise of jurisdiction under this Order by the Courts of British Bechuanaland, but only to the extent directed by the Governor by proclamation. It is to be noted no such proclamation has, in fact, been made. Sect. 8 provides that jurisdiction exercisable otherwise than under this Order shall remain in force.

I will now deal with the Proclamation of June 10, 1891, which seems to me to provide a complete system for the administration of justice, including the appointment of resident commissioners, assistant commissioners, judges, magistrates, and other officers, with such powers as the High Commissioner may assign, subject to the provisions of the Order. Sect. 1 limits the powers of the resident commissioners to such parts of the territories within the limits of the orders as shall be assigned to them. By s. 3 every resident commissioner is thereby empowered "to exercise jurisdiction in and adjudicate upon all causes, suits, and actions whatsoever, civil or criminal," within the territory assigned to him. Sect. 4 makes it "lawful for any assistant commissioner or magistrate duly appointed for the said territory to hold a court at such place or places as shall be fixed, and to exercise such jurisdiction as

(1) 1 Cowp. at p. 208.

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shall be conferred by law, or defined in and by his commission." Sect. 8 provides that the jurisdiction of the Courts held under this proclamation "shall not extend to any matter in which natives only are concerned unless in the opinion of such court the exercise of such jurisdiction is necessary in the interests of peace or for the prevention or punishment of acts of violence to person or property." Sect. 9 provides that in native cases native law is to be followed. Sect. 10 provides for the appointment of native chiefs to exercise jurisdiction. Sect. 13 provides that legal proceedings, including sentences, judgments, and orders, are to be carried on in open Court. Sect. 16 provides for appeal in all cases from any judgment or decision of any assistant commissioner, magistrate, or inspector of police, having jurisdiction over the matter in dispute. Sect. 18 provides that every resident commissioner shall have full power and authority to review and correct the proceedings of all Courts or officers in the territory assigned to him in all cases and proceedings whatsoever. Sect. 19 provides: "Subject to the foregoing provisions of this proclamation, in all suits, actions, or proceedings, civil or criminal, the law to be administered shall, as nearly as the circumstances of the country will permit, be the same as the law for the time being in force in the Colony of the Cape of Good Hope." It seems to be common ground that in effect proceedings by way of writ of habeas corpus can be taken and enforced by the law of the Colony of the Cape of Good Hope.

By Proclamation dated March 2, 1895, the High Commissioner directed that the rules, orders, and regulations respecting the manner and form of proceeding in civil and criminal cases before the Court of any resident commissioner in the Protectorate should, mutatis mutandis, and so far as the circumstances of the said Protectorate would admit, be the same as those of the Supreme Court of the Colony of the Cape of Good Hope; then, by Proclamation of February 11, 1896, that assistant commissioners and resident magistrates in the Protectorate should have jurisdiction in all civil and criminal suits and proceedings over and against all persons residing within their respective areas of jurisdiction. By the said proclamation (February 11, 1896), it was further provided that all the powers of the Supreme Court

of the Cape Colony should in the said Protectorate be exercised by the resident commissioner within his area, provided, nevertheless, that no original civil action, suit, or proceeding should be instituted in his Court in the first instance as therein mentioned. The Proclamation of September 14, 1906, after reciting that by the Order of May 9, 1891, the High Commissioner was empowered to provide for the peace, order, and good government of all persons within the limits of the said Order, repeals an Order of June 30, 1891, and provides that the High Commissioner may order any person dangerous to peace and order to leave the Protectorate, and provides for a penalty to be inflicted by a resident commissioner, assistant commissioner, or magistrate in case of failure to comply with the order of the High Commissioner. Sect. 3 provides for such dangerous person being removed from the Protectorate by warrant under the hand of the resident commissioner, and for a severe penalty on conviction in case of return after removal. This proclamation only differs in severity from a similar Proclamation of June 30, 1891, and has never been disallowed in the manner provided by s. 6 of the Order in Council of May 9, 1891. [The Lord Justice then read the Proclamation of December 5, 1906, set out above, and continued :—]

I think I have now detailed sufficiently the statutes, the Orders in Council, and the proclamations relied on by the Crown, which I shall now set forth. The contentions put forward on behalf of the Crown seem to be briefly: 1. That the Act of 1862 prevents the issue of a habeas corpus in the Protectorate because the Bechuanaland Protectorate is, as stated in the affidavit of Lord Crewe, a foreign country within which His Majesty has power and jurisdiction by treaty, grant, usage, sufferance, or other lawful means within the meaning of the Foreign Jurisdiction Act, 1890, and because the Protectorate is, within the meaning of s. 1 of the Habeas Corpus Act, 1862, a foreign dominion of the Crown where His Majesty has a lawfully established Court or Courts of justice having authority to grant and issue a writ of habeas and to ensure the due execution thereof throughout such colony or dominion, and because by s. 1 of the said Act no writ of habeas shall issue out of England

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into any colony or foreign dominion. 2. Because the Order in Council of May 9, 1891, is a lawful and valid Order affecting the Bechuanaland Protectorate, and because the proclamations of the High Commissioner from June 10, 1891, down to and inclusive of the Proclamation of December 5, 1906, are lawful and valid proclamations. 3. Because Lord Crewe, to whom the rule nisi is addressed, has not the custody of the body of Sekgome according to the statutes and principles relating to the writ of habeas corpus. 4. Because the arrest and detention of Segkome are acts of State.

As to contention 1, I do not think that the Act of 1862 has any application to the Protectorate, and it does not therefore seem to me that the question as to whether, within the meaning of that Act, there is within the Protectorate a lawfully established Court or Courts of justice of His Majesty having authority to grant and issue a writ of habeas corpus and to ensure the due execution thereof throughout such colony or dominion, arises, but, taking this view, it is convenient here to note that in my opinion, even if the Act of 1862 did apply, there would be considerable difficulty as to the existence of a Court with authority to grant a habeas, for I do not find anything in the statutes, Orders in Council, or proclamations which satisfies me as to the existence of such a Court with such power to ensure due execution of a writ of habeas, and, at all events, the terms of the Proclamation of December 5, 1906, negative the existence of such a Court as far as Sekgome is concerned. I do not forget that s. 7 of the Order in Council of May 9, 1891, provides that "the courts of British Bechuanaland shall have in respect of matters occurring within the limits of this Order the same jurisdiction, civil and criminal, original and appellate, as they respectively possess from time to time, in respect of matters occurring within British Bechuanaland, and the judgments, decrees, orders, and sentences, of any such court made or given in the exercise of the jurisdiction hereby conferred may be enforced and executed, appeals therefrom may be had and prosecuted in the same way as if the judgment, decree, order, or sentence, had been made or given under the ordinary jurisdiction of the court. But the jurisdiction hereby conferred shall only be exercised by such

courts, and in such manner and to such extent as the Governor of British Bechuanaland shall by proclamation from time to time direct." No such proclamation has been issued, as was admitted in argument by Mr. Rowlatt, who said that the Courts of British Bechuanaland have not been empowered to deal with the jurisdiction given by clause 7. I do not, however, think it necessary to discuss further the question as to the existence in the Protectorate of a Court having authority to issue a writ of habeas corpus and to ensure the due execution thereof, because, as I have already said, I am of opinion that the Act of 1862 has no application whatsoever to the Protectorate.

As to contention 2—namely, that the Order in Council of May 9, 1891, is a valid order affecting the Protectorate, and that the proclamations of the High Commissioner from June 10, 1891, down to and inclusive of the Proclamation of December 5, 1906, are lawful and valid proclamations—the Lord Chief Justice, while treating the Order in Council and Proclamations generally as lawful and valid, declines to express any opinion as to the Proclamation of December 5, 1906. I have, however, myself come to the conclusion that the Proclamation of December 5, 1906, is valid, and I think it right to give my reasons. Generally, I may say, I am of opinion that it is impossible for us to say that at the date of the Order in Council of May 9, 1891, the territory, the subject of that Order, was not a foreign country, that is, a country out of Her Majesty's dominions. The territory constituting the Protectorate of Bechuanaland had not been annexed so as to become part of Her Majesty's territorial dominions, and, as stated by Lord Crewe, "the territory of the Bechuanaland Protectorate is foreign territory under His Majesty's protection; it has never been acquired by settlement, or ceded to, or conquered, or annexed, by His Majesty, or any of his Royal predecessors, nor has His Majesty, or any of his Royal predecessors, recognized the same as, nor is it, part of his dominions, but he has power and jurisdiction within the same." The Order in Council of May 9, 1891 (as amended by the Protectorate Order in Council of July 30, 1891), made under the Foreign Jurisdiction Act, 1890, recognized on behalf of Queen Victoria this state of things. Bechuanaland Protectorate is under

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His Majesty's dominion in the sense of power and jurisdiction, but is not under his dominion in the sense of territorial dominion. It is to be noted that s. 16 of the Foreign Jurisdiction Act provides that the expression "jurisdiction" includes "power." Assuming, then, the jurisdiction of the High Commissioner to make proclamations, what are the objections to this Proclamation of December 5, 1906? First it is said that this proclamation not only indemnifies the resident commissioner for acts done in connection with the past detention of Sekgome, but also provides for his future detention under a warrant of the High Commissioner without any regard to the Proclamation of September 14, 1906, which sets forth the administrative and judicial procedure to be applied in cases where there are reasonable grounds for believing that the presence of any person within the protectorate is dangerous to its peace, order, or good government, and defines the penalties to be imposed on conviction before a resident commissioner, assistant commissioner, or resident magistrate. It is said that this Proclamation of December 5, 1906, ignores a proclamation which has never been disallowed and is still in full force. This is the objection which has caused me the greatest doubt. If the Proclamation of December 5, 1906, is regarded as legislation it is difficult to see how the Proclamation of December 5 can be reconciled with that of September 14. The Proclamation of December 5 cannot be regarded as a mere indemnity for past acts; it is really a proclamation of the outlawry of a particular person, but I am not prepared to say that such a proclamation is not a proclamation which may be made by the High Commissioner in his discretion for the maintenance of peace, order, and good government of all persons within the limits of the Order of May 9, 1891, s. 4, nor can I say that such an exercise of discretion is taken away by the express provisions for criminal procedure in the Order of September 14, 1906.

As to contention 3, that Lord Crewe, to whom the rule nisi is addressed, has not the custody of the body of Sekgome, I have already stated that I am by no means satisfied that, having regard to the statute 16 Car. 1, c. 10, s. 6 and s. 8, actual custody of the body by the person to whom the writ is addressed is essential to the issue of the writ of habeas.

I have already expressed my doubts as to whether the writ of habeas needs must be addressed to the person having actual custody of the person on whose behalf the writ of habeas is issued out, and have stated my view that such a writ can be properly addressed to the person who has such control that he can order the gaoler to release the prisoner, but it is said that the gaoler in this case is not the gaoler of the King and owes no obedience to the orders of the High Court in England. I do not give much weight to this objection. The judgment of Cockburn C.J. in *Ex parte Anderson* (1) makes it clear that before the statute of 1862 the writ would have run in the colonies and other the King's territorial dominions and in countries conquered by the King, such as Calais, and could have been ordered to issue by the Court of King's Bench in England. This being so, I ask myself why, if the writ of habeas can be issued to the King's territorial dominions, the writ should not be ordered to go to any country or place under the subjection of the Crown of England whenever it is suggested to the Court in England that a subject of the Crown is illegally imprisoned. The very fact that Parliament by the Foreign Jurisdiction Act, 1890, and the earlier Acts dealing with foreign jurisdiction is party to the exercise by the King of extra-territorial jurisdiction shews that the extra-territorial jurisdiction of the King is not a merely personal jurisdiction. It is the King acting with the concurrence of Parliament, and although Cockburn C.J. in *Ex parte Anderson* (2) says "These writs of habeas corpus have been issued and are to be issued into all the dominions of the Crown of England whenever it has been suggested to the Court that a subject of the Crown is illegally imprisoned or illegally kept in custody," it is by no means clear that the Chief Justice meant by dominions territorial dominions as distinguished from dominions where the King with the concurrence of Parliament exercises jurisdiction and, in that sense, dominion. It is plain from the case of *Ex parte Anderson* (1) itself, and from the case of *Carus Wilson* (3), that the Courts in England have not allowed inconvenience which might arise in giving effect to the writ

(1) 3 E. & E. 487; 30 L. J. (Q.B.) 129. (2) 30 L. J. (Q.B.) at p. 132.
(3) 7 Q. B. at p. 998.

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to be a ground for refusing to issue it, or been deterred from ordering the writ to go because of the possibility of disobedience arising from the mode of possession. In the present case the King has every means of enforcing obedience. The Crown, with the concurrence of Parliament, has exercised jurisdiction throughout the Bechuanaland Protectorate and has appointed judges and police officers to execute their judgment, and has established Courts which the Crown contends, I think wrongly, have power to issue a writ of habeas and enforce it; in short, has established laws which the dwellers in the Protectorate, whether natives or mere residents, must obey, and from which they surely must be entitled to receive protection when injured. Is the mere fact of absence of annexation and theoretical possession to deprive the Crown and those who are under the law from the benefits and power of the writ of habeas? But even if it is not essential that the writ of habeas should be addressed to the person having actual custody of the body, and sufficient if the writ is addressed to a person having control of the person having the actual custody of the body, I think that it is Lord Selborne, the High Commissioner, to whom a writ of habeas should be addressed, and not the Colonial Secretary, who has no control over Sekgome's custody, and can only advise.

The fourth contention of the Crown is that the arrest and detention of Sekgome are acts of State which cannot be questioned in the law courts. I am inclined to think that, assuming the Protectorate of Bechuanaland is a country which has never been annexed, this contention is well founded. I am assuming that no act of the Crown has since the creation of the Protectorate constituted a grant to the inhabitants of the Protectorate of a constitution; I assume this because, although the grant to a ceded or conquered country of a complete system of laws may constitute an irrevocable grant of a constitution, yet there is no such grant in the present case, because the Order in Council which provided a system of laws made that provision on the express condition that Her Majesty might disallow wholly or in part any proclamation, and because the Secretary of State tells us by his affidavit that the Bechuanaland Protectorate has never been acquired by settlement by His Majesty. I do not

think it necessary to express any opinion as to what might be the rights of an Englishman resorting temporarily to the Protectorate in respect of the grant of a writ of habeas, because no such question is raised in the present case, and I have not therefore to consider the effect upon such a question of the first three sections of the Foreign Jurisdiction Act. It is said that Sekgome is a British subject, and it is so sworn in one of the affidavits for the Crown, but he is not a British subject in the sense in which I have just spoken. It may be that an Englishman resorting to the Bechuanaland Protectorate carries the habeas with him, but Sekgome certainly does not. Generally, I think that the result of the Foreign Jurisdiction Act, 1890, and the proclamations thereunder is in respect of the Bechuanaland Protectorate to give His Majesty absolute power, subject to the provisions of any Act of Parliament, to say from time to time what law should be applied in these territories outside His Majesty's dominions, just as if the territory had been the subject of absolute conquest, since in my opinion there has been no annexation and no constitution has been granted. I am of course speaking wholly independently of any international view. The result is that the Foreign Jurisdiction Act, 1890, gave to Her Majesty absolute power to say what law should be applied in these territories outside Her Majesty's dominions as if the territory had been acquired by cession or absolute conquest, or, as Lord Halsbury said during the argument in *Staple's Case* (1), which was a case governed by the Foreign Jurisdiction Act, 1890, " There is no doubt that under such circumstances as these " (namely, where there has been no annexation) " the Queen may make such laws as she pleases."

In conclusion, I have no doubt but that in the Act of 1862 dominion is used in the sense of territorial dominion, nor but that in the Foreign Jurisdiction Act, 1890, when the expression " out of Her Majesty's dominions " is used it means outside Her Majesty's territory. I have no doubt but that at the date of the Order in Council of May 9, 1891, the Protectorate was outside the territorial dominion. I recognize that a country which originally was a foreign country outside the territorial dominions

(1) Unreported.

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of the Crown might in course of time become a part of the territorial dominions of the Crown, and this by the acts of the Crown without any formal act of annexation, especially in a case where the land in question had ceased to be a land in which British subjects were, to use the words of s. 2 of the Foreign Jurisdiction Act, 1890, "British subjects for the time being resident in or resorting to that country," but had become a British settlement by virtue of the extent to which British subjects had permanently settled there with the assent of the Crown, but I do not find any evidence leading to the conclusion that the Bechuanaland Protectorate has ceased to be a foreign country outside the territorial dominions of the Crown. I am inclined to think that in a case where the King legislates by proclamation, by virtue of an Act of Parliament, such as the Foreign Jurisdiction Act, 1890, the mere fact of the country not having been annexed, and being extra-territorial, would not prevent the issue by the King's Bench Division, or the judges of the High Court, of a writ of habeas to run in a country governed by a system of laws created under the powers of such an Act of Parliament, especially in a case where the laws thus created apply to British subjects for the time being resident in or resorting to the country in question; but in the present case one has to remember that we are dealing with Orders in Council which, having been "laid before Parliament," have effect as if they had been enacted in the Foreign Jurisdiction Act, 1890, itself, and that the Order in Council of May 9, 1891 (as amended by the Order in Council of July 30, 1891), by ss. 5 and 6 provides for the disallowance of any proclamation wholly or in part, and that the proceedings taken against Sekgome are warranted by the Proclamation of December 5, 1906, which itself, by clause 5, provides that no writ or process calling in question the arrest or detention of Sekgome shall have any effect within the Protectorate. All this seems to exclude the application of the fourth and sixth of the propositions laid down by Lord Mansfield in his judgment in *Campbell* v. *Hall*. (1)

On the whole I think that the effect of these proclamations made under the authority of the Foreign Jurisdiction Act, 1890,

(1) 1 Cowp. at pp. 208, 209.

is to prevent Sekgome obtaining in this country or in the Courts of the Protectorate a writ of habeas, and I am also of opinion that if he were refused in the Courts of the Protectorate a writ of habeas, a hearing, or an application for such a writ, an appeal would lie to the Privy Council; and further that, even if, as suggested by Mr. Hall, the operation of the Foreign Jurisdiction Act, 1890, is so limited to British subjects that it does not authorize so far as natives are concerned the issue of these proclamations, a contention with which I cannot agree, his detention would be justified as an act of State.

I have omitted to mention the contention of Mr. Lush based on the Order in Council of May 16, 1904. This Order in Council begins with a recital of the jurisdiction of the King, quoting from the very words of the preamble of the Foreign Jurisdiction Act, 1890. Then follows a recital: "And whereas the chiefs Khama, Sebele, and Bathon have abandoned all rights and jurisdiction in and over a certain portion of their former territories," and then it proceeds to make an order specifically by virtue of and in the exercise of the powers on this behalf by the Act of 1890 or otherwise in His Majesty vested. It is admitted that Crown lands as defined by s. 1 of this Order includes Gaberones, the place where Sekgome is now detained. Sect. 2 vests all rights of His Majesty in or in relation to any Crown lands in the High Commissioner on behalf of His Majesty, and gives the High Commissioner power to make grants or leases of any Crown lands subject to the directions received from one of His Majesty's principal Secretaries of State. Sect. 3 enacts that this Order may be cited as The Bechuanaland Protectorate (Lands) Order in Council, 1904. Mr. Lush argued that the effect of this Order was that these lands were no longer out of His Majesty's dominions within the meaning of s. 16 of the Foreign Jurisdiction Act, 1890, and were annexed by the King by the effect of the provisions of the Order. I cannot agree. I think that the effect of the Order is to leave these Crown lands out of His Majesty's dominions.

This appeal must be dismissed with costs. The idea that there may be an established system of law to which a man owes

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obedience, and that at any moment he may be deprived of the protection of that law, is an idea not easily accepted by English lawyers. It would be more congenial to our love as a nation of liberty and justice to act on the eloquent words of Lord Watson in *Sprigg* v. *Sigcau* (1), but the country in that case was an annexed country under the Pondo Annexation Act, and our single duty is to construe the Foreign Jurisdiction Act, 1890, the Orders in Council, and proclamations made thereunder. It is made less difficult if one remembers that the Protectorate is over a country in which a few dominant civilized men have to control a great multitude of the semi-barbarous.

FARWELL L.J. read the following judgment:—In 1906 a dispute had arisen between the appellant and one Mathibe as to the chieftainship of the Batawana tribe in the Bechuanaland Protectorate, and the High Commissioner, considering the presence of the appellant within the limits of the Batawana tribe to be a danger to the peace of the tribe, and likely to lead to bloodshed and tribal war, caused him to be imprisoned at Gaberones, a place outside the limits of the tribe, but within the Protectorate, and on December 5, 1906, issued a proclamation indemnifying the resident commissioner in respect of the detention, authorizing the High Commissioner to continue the detention, and to deport the appellant, and depriving him of all rights of calling in question his arrest, detention, or deportation by any process within the Protectorate. The appellant is still imprisoned at Gaberones.

The appellant obtained a rule nisi calling on Lord Crewe as Secretary of State for the Colonies to shew cause why a writ of habeas corpus should not issue requiring him to produce Sekgome in Court in England, or justify his detention, and he has justified the detention by the powers given to the High Commissioner by Orders in Council under the Foreign Jurisdiction Act, 1890, and in particular by an Order of May 9, 1891; and he further objects that no writ of habeas corpus can issue in this country by reason of the 25 & 26 Vict. c. 20, and also that the Secretary of State is in any case not answerable. The Divisional

(1) [1897] A. C. 238.

Court has adopted the last two contentions and has not decided the first.

The first contention is one of great importance, as it raises the question of the right of the Crown by Order in Council to create a despotism in the Protectorate, subject only to the provisions of any Act of Parliament extending to His Majesty's subjects in the Protectorate (see s. 12 of the Foreign Jurisdiction Act, 1890)—a proposition that at first sight appears startling. It is, however, necessary to bear in mind the circumstances under which, and the countries to which, such Orders apply, and the real nature of such Orders, which, although called Orders in Council, in fact derive all such despotic authority as they possess from the Legislature, and not from the Crown.

The British Protectorate in Bechuanaland commenced in 1884 or 1885 by treaties with the native chiefs and by an Order in Council and Proclamation of 1885. The country was, and is, territory inhabited by natives who outnumber the white population probably by more than a hundred to one. There is no statutory definition of a Protectorate, nor has it received any judicial interpretation, but it is clear that, for the purposes of the Foreign Jurisdiction Acts, it means territory outside the dominions of the Crown, but over which the Crown exercises some jurisdiction; the origin and extent of the word is discussed by Sir John Macdonell in an article "Protectorate" in the Encyclopædia Britannica, vol. 32. The Crown has, of course, no jurisdiction over foreign territory except such as it has obtained by treaty, capitulation, grant, usage, sufferance, or other similar means; and when the Crown has obtained such jurisdiction as between itself and the foreign territory, such jurisdiction as between the Crown and its own subjects is defined by the Act to be exercisable in the same and as ample a manner as if acquired by the cession or conquest of territory; and s. 11 provides that every Order in Council made in pursuance of the Act shall be laid before both Houses of Parliament forthwith after it is made, "and shall have effect as if it were enacted in this Act." The extent of the jurisdiction of the Crown is stated in Blackstone's Commentaries, vol. 1, p. 108, and in a note to chapter 1 of Forsyth's Cases and Opinions,

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p. 12, where a large number of cases are collected. Lord Mansfield says in *Campbell* v. *Hall* (1), "A country conquered by the British arms becomes a dominion of the King in the right of his Crown; and therefore necessarily subject to the Legislature, the Parliament of Great Britain." That is the first of Lord Mansfield's propositions. Then, "The sixth and last proposition is that if the King (and when I say the King I always mean the King without the concurrence of Parliament) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles; he cannot exempt an inhabitant from that particular dominion; as for instance, from the laws of trade, or from the power of Parliament, or give him privileges exclusive of his other subjects; and so in many other instances which might be put." Lord Mansfield's first proposition assumes a proposition which is self-evident, namely, that the Royal jurisdiction may be extended by Act of Parliament. It follows, therefore, that Crown and Parliament together can by enactment make provisions which the Crown alone could not direct, and this is, in my opinion, the solution of the present case. The matters complained of have been done not merely by authority of the Crown, but by authority of Crown and Legislature, for the proclamation under the Order in Council of May 9, 1891, has effect after a date long past as if it were contained in the Order. Clause 5 of the Order says: "Every proclamation of the High Commissioner shall be published in the Gazette, and shall from and after a date to be mentioned in such proclamation, and thereafter until disallowed by Her Majesty or repealed or modified by any subsequent proclamation, have effect as if contained in this Order"; and the Order itself, including the proclamation, is read into the Foreign Jurisdiction Act, 1890, under s. 11 thereof, and has effect as if it had been thereby enacted. It is under these powers of the Crown and Parliament that legislative assemblies in colonies with powers to legislate for peace, order, and good government have been created, and as such assemblies derived

(1) 1 Cowp. at pp. 208, 209.

their powers from the Imperial Act creating them, and had no powers beyond those given expressly or by implication by such Act, questions arose as to the extent to which such legislative assemblies might disregard the common law and the statutory law of England. It was long ago recognized that such laws were not always expedient or advisable in all cases and in all countries, and accordingly by 28 & 29 Vict. c. 63 it was enacted, by s. 2, "Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the Colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the Colony the force and effect of such Act, shall be read subject to such Act, order or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative." Then s. 3 says: "No colonial law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid." The Foreign Jurisdiction Act of 1890 follows on the same lines, and s. 12 is in almost identical terms.

The first question then is, What is the true construction of s. 12? It is clear that repugnancy to the law of England is permitted, as is also any repugnancy to statute law not being repugnancy to the provisions of any Act of Parliament extending to His Majesty's subjects "in that country," that is, the country to which the Order in Council relates. Now these words in a colonial Act have received interpretation in the Exchequer Chamber and in the Privy Council. In *Phillips* v. *Eyre* (1) the Legislature of Jamaica had passed an Act indemnifying Governor Eyre for certain things done by him in suppressing a negro rising; the plaintiff Phillips had been flogged and imprisoned by his orders, and both the Queen's Bench and the Exchequer Chamber held that the Act had deprived the plaintiff of all remedy. Willes J., in giving judgment, says (2): "It was further argued that the Act in question was contrary to the principles of English law, and therefore void. This is a vague expression, and must

(1) L. R. 4 Q. B. 225; L. R. 6 Q. B. 1. (2) L. R. 6 Q. B. at p. 20.

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mean either contrary to some positive law of England, or to some principle of natural justice, the violation of which would induce the Court to decline giving effect even to the law of a foreign sovereign State. In the former point of view, it is clear that the repugnancy to English law which avoids a colonial Act means repugnancy to an imperial statute or order made by authority of such statute applicable to the colony by express words or necessary intendment; and that, so far as such repugnancy extends, and no further, the colonial Act is void." He also dealt with the objection that the Act was against natural justice at p. 23. He says: "It was further objected, that the colonial law was contrary to natural justice, as being retrospective in its character, and taking away a right of action once vested, and that for this reason, like a foreign law against natural justice, it could have no extra-territorial force." And, after discussing the matter, he concludes thus at p. 27: "In fine, allowing the general inexpediency of retrospective legislation, it cannot be pronounced naturally or necessarily unjust. There may be occasions and circumstances involving the safety of the State, or even the conduct of individual subjects, the justice of which, prospective laws made for ordinary occasions and the usual exigencies of society for want of prevision fail to meet, and in which the execution of the law as it stood at the time may involve practical public inconvenience and wrong, summum jus summa injuria. Whether the circumstances of the particular case are such as to call for special and exceptional remedy is a question which must in each case involve matter of policy and discretion fit for debate and decision in the Parliament which would have had jurisdiction to deal with the subject-matter by preliminary legislation, and as to which a Court of ordinary municipal law is not commissioned to inquire or adjudicate." This answers Mr. Lush's argument that legislation directed against a particular individual and depriving him of the rights given to all the other inhabitants of the country is contrary to natural justice; if it is necessary for the safety of the State, the freedom and even the life of the individual must be sacrificed to it. The unreported case of *Staples* v. *The Queen* in the Privy Council disposes of the argument founded on the Habeas Corpus Acts. The Board,

consisting of Lord Halsbury, Lord Hobhouse, Lord Macnaghten, Lord Davey, and Sir Richard Couch, dismissed an application for leave to appeal against a conviction in Buluwayo for theft, by a judge and four assessors, on the ground that the appellant was entitled by Magna Charta to be tried by a jury. Their Lordships say this: "The repugnancy contemplated by the Foreign Jurisdiction Act, 1890, s. 12, must mean repugnancy to a statute or order applied in some special way to British subjects in the foreign country in question. It would be a most unreasonable limit on the Crown's powers of introducing laws fitting to the circumstances of its subjects in a foreign country if it were made impossible to modify any Act of Parliament which prior to the Order in Council might be invoked as applicable to a British subject."

It is true that the words in 16 Car. 1, c. 10, s. 6, are quite general, but the words in s. 12 of the Foreign Jurisdiction Act, 1890, "extending to Her Majesty's subjects in that country," are not satisfied by general words. The words in Magna Charta, "Nullus liber homo," are as general as those in the Habeas Corpus Act, but there are general words in most Acts of Parliament. The meaning of s. 12 is, in my opinion, that words must be used shewing either that the particular territory is included or that all localities are included; e.g., the Slave Trade Act, 1843, s. 1, extends and applies "to British subjects wheresoever residing or being and whether within the dominions of the British Crown or of any foreign country." No colonial Legislature or Order in Council could, in my opinion, abrogate or disregard this Act. It is said that the Habeas Corpus Acts are the bulwarks of liberty in our country, but even in the United Kingdom the Habeas Corpus Acts have been suspended by Act of Parliament when the public safety required. Fifteen instances between 1 William & Mary and 11 & 12 Victoria are given in Forsyth's Cases and Opinions, p. 452, and Magna Charta is as much a bulwark of our liberties as the latter Acts. The truth is that in countries inhabited by native tribes who largely outnumber the white population such acts, although bulwarks of liberty in the United Kingdom, might, if applied there, well prove the death warrant of the whites. When the State takes the responsibility of Protectorates over such territories, its first duty

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is to secure the safety of the white population by whom it occupies the land, and such duty can best be performed by a responsible officer on the spot. There are many objections to the government of such countries from Downing Street, but the governor's position would be impossible if he were to be controlled by the Courts here, acting on principles admirable when applied to an ancient well ordered State, but ruinous when applied to semi-savage tribes. This view is supported by *Riel* v. *The Queen* (1), and there is nothing contrary to it in *Sprigg* v. *Sigcau* (2), which turned simply on the construction of a clause in a colonial Act, and Lord Watson's observations (3) are expressly applied "to a colony having a settled system of criminal law and criminal tribunals," a state of things very different from that existing in the Bechuanaland Protectorate.

I am, therefore, of opinion that the Crown by Order in Council (which by s. 11 of the Foreign Jurisdiction Act, 1890, has effect as if it was enacted in that Act) has power to make orders abrogating the Habeas Corpus Acts, either generally or in respect of a particular individual named therein. The ultimate authority for such abrogation is the Act of the Imperial Legislature, although the means adopted are an Order of the King in Council. I have assumed that the appellant's counsel are right in claiming that he is a British subject, so that the Foreign Jurisdiction Act applies to him, and it is therefore unnecessary to consider whether that Act applies or not to any but British subjects. If that Act did not apply, I could not hold that the Crown alone, without any Act of Parliament, could suspend the Habeas Corpus Act, or authorize the acts complained of by the appellant, but I fail to see how any Court can say that the Legislature—that is, the Crown, Lords, and Commons—has not jurisdiction to set up a despotism in any of the dominions of the Crown, or, indeed, in the United Kingdom itself, although the results might be even more disastrous than the attempt in the eighteenth century to tax the American Colonies.

The next question is whether the Order of May 9, 1891, has this effect. This is a question of the construction of that Order,

(1) 10 App. Cas. 675. (2) [1897] A. C. 238.
(3) [1897] A. C. at pp. 246, 247.

and I am of opinion that it has. It is made expressly in exercise of the powers given by the Foreign Jurisdiction Act, and provides that "The High Commissioner may on Her Majesty's behalf exercise all powers and jurisdiction which Her Majesty, at any time before or after the date of this Order, had or may have within the limits of this Order, and to that end may take or cause to be taken all such measures, and may do or cause to be done all such matters and things within the limits of this Order as are lawful, and as in the interest of Her Majesty's service he may think expedient, subject to such instructions as he may from time to time receive from Her Majesty or through a Secretary of State." It is said that the words "as are lawful" limit the construction to matters lawful in this country. In my opinion the meaning is "lawful within the meaning of the Foreign Jurisdiction Act," and this brings in s. 12 of that Act. The Proclamation of 1906 is made under clause 4 "for the peace, order and good government of all persons within the limits of the Order," including the prohibition and punishment of acts tending to disturb the public peace. The same words are found in the Canadian Act which was challenged in *Riel's Case* (1), where Lord Halsbury says that "they are apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to. They are words under which the widest departures from criminal procedure as it is known and practised in this country have been authorized in Her Majesty's Indian Empire." I have already pointed out that under clause 5 of the Order the proclamation, after publication in the Gazette, which was done long ago, has effect as if it were contained in the Order, and as the Order has effect as if it were contained in the Act, the proclamation has effect in the same way. I am therefore of opinion that the Crown by virtue of the Act of 1890 had power to authorize and has authorized the detention of the appellant. It was suggested that Gaberones, the place where the appellant is confined, is not within the Protectorate. It is, however, stated to be so in the Proclamation of October 29, 1896, and even if by later proclamations Gaberones has been abandoned by the native chiefs and has become Crown land, it is not in my opinion

(1) 10 App. Cas. at p. 678.

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possible for us to hold that such lands have ceased to be protected and have become subject to the Crown in every sense. If this was a question intended to be raised on this application, the fact should have been proved by application by the Divisional Court to the Secretary of State under s. 4, sub-s. 2, of the Foreign Jurisdiction Act, 1890. In the absence of such evidence I think that we are bound to assume that Gaberones still remains a part of the Protectorate.

This disposes of the case, and it is not necessary for me to express an opinion on the other points that have been argued and on which the Divisional Court decided. I must not, however, be taken to assent to the view that there is any Court to which application for a writ of habeas corpus could be made within 25 & 26 Vict. c. 20, or to the view that the Secretary of State would not be the proper person to make a return to a writ of habeas corpus if there had been no Proclamation of December 5, 1906. Where a man who owes obedience to laws imposed by England is imprisoned and kept imprisoned without trial in a place maintained by England, and placed under the control of an officer of the Crown who acts under the orders of the Colonial Office, and who has acted in the particular case with the assent and approval of and is supported by the Colonial Office, I should be slow to conclude that the Secretary of State could not be called on to make a return to the writ. Both points are of great interest and importance, and I express no final opinion on either of them, but on the grounds already stated I am of opinion that this appeal must be dismissed.

KENNEDY L.J. The decision of this appeal appears to me to involve the consideration of five questions. (1.) Is Sekgome a British subject? (2.) Is Gaberones, where Sekgome is confined, part of a foreign dominion of the Crown within the meaning of 25 & 26 Vict. c. 20? (3.) If Gaberones is a part of a foreign dominion of the Crown, has His Majesty in such dominion a lawfully established Court having authority to grant and issue a writ of habeas corpus, and to ensure its due execution throughout such dominion within the meaning of the above-mentioned statute? (4.) Is the Proclamation of his Excellency the High

Commissioner of South Africa dated December 5, 1906, whereunder Sekgome was detained and is still detained at Gaberones, (*a*) valid, (*b*) an act of State which is not open to question in the present proceedings in the High Court of Justice? (5.) Assuming that a case is made out for the grant and issue of a writ of habeas corpus directed to the person or persons detaining Sekgome in custody at Gaberones, is His Majesty's Secretary of State for the Colonies such a person?

The first four of the foregoing questions are more or less closely connected with each other, and I shall so consider them; but the fifth is a distinct and independent question. If it must be answered adversely to the appellant his appeal fails, even if on all other points he should be entitled to succeed. I shall deal with it after dealing with the four connected questions.

Upon the first question, namely, whether Sekgome is or is not a British subject, I think that the latter view is correct. Sekgome was born and has remained a member of a native African tribe called the Batawana tribe, dwelling in a region which has for some years (see Proclamation of March 29, 1899) become officially entitled "The Batawana Native Reserve," near Lake Ngami, within the Bechuanaland Protectorate. Now the features of Protectorates differ greatly, and of this a comparison of the British Protectorates of native principalities in India, the British Protectorate of the Ionian Islands between 1815 and 1864, the Protectorate of the Federated Malay States, and the Bechuanaland Protectorate as constituted by the Orders in Council and proclamation before mentioned, affords ample illustration. Other instances of Protectorates will be found in Wheaton, International Law, 4th ed., pp. 51 to 66. The one common element in Protectorates is the prohibition of all foreign relations except those permitted by the protecting State. Within a Protectorate, the degree and the extent of the exercise by the protecting State of those sovereign powers which Sir Henry Maine has described (International Law, p. 58) as a bundle or collection of powers which may be separated one from another, may and in practice do vary considerably. In this Bechuanaland Protectorate every branch of such government as exists—administrative, executive, and judicial—has been created and is

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maintained by Great Britain. What the idea of a Protectorate excludes, and the idea of annexation on the other hand would include, is that absolute ownership which was signified by the word "dominium" in Roman law, and which, though perhaps not quite satisfactorily, is sometimes described as territorial sovereignty. The protected country remains in regard to the protecting State a foreign country; and, this being so, the inhabitants of a Protectorate, whether native born or immigrant settlers, do not by virtue of the relationship between the protecting and the protected State become subjects of the protecting State. As Dr. Lushington said in regard to the inhabitants of the Ionian States, then under a British Protectorate, in his judgment in *The Ionian Ships* (1), "allegiance in the proper sense of the term undoubtedly they do not owe; because allegiance exists only between the Sovereign and his subjects, properly so called, which they are not." A limited obedience the dwellers within a Protectorate do owe, as a sort of equivalent for protection; and in the present case the Orders in Council relating to the Bechuanaland Protectorate and the proclamations of the High Commissioner made thereunder imply the duty of obedience on the part of Sekgome and other persons within the area of the Protectorate to a practically unlimited extent.

I have felt it to be right that I should deal with this question of Sekgome's political status, which was discussed by counsel at considerable length, but in truth it appears to me to have little materiality. In my opinion the mere fact that a person in detention ought to be considered as not being in the strict sense of the term a British subject could not in itself be treated as impairing the jurisdiction of the High Court of Justice to direct the issue of the writ, if it were shewn that his custodian was detaining him within a British dominion and claiming so to detain him in the exercise of powers conferred upon him by British jurisdiction. The remedy obtainable by the writ of habeas corpus is not confined to British subjects. The alien who is detained under a warrant of extradition is entitled to apply for a writ of habeas corpus in order to obtain release; and, subject, of course, to any question which may arise under the

(1) (1855) 2 Ecc. & Adm. 212, at p. 226.

limitations of the statute of 1862 (25 & 26 Vict. c. 20), if Gaberones, where Sekgome is detained, can rightly be held to be within the foreign dominions of the Crown, I do not think that the jurisdiction of the High Court of Justice to issue the writ of habeas corpus could be affected in any way by the fact that Sekgome is not a British subject.

But the respondent raises several points which must now be considered: (1.) That if the locality of Sekgome's confinement is within the dominions of the Crown (which the respondent denies), there are lawfully established Courts there which have authority to grant and issue a writ of habeas corpus and to ensure its due execution, and therefore the applicant here is barred by the provisions of 25 & 26 Vict. c. 20. (2.) That the place where Sekgome is confined is not within a "dominion" of the Crown, but forms part of a foreign country within which His Majesty has jurisdiction within the meaning of the Foreign Jurisdiction Act, 1890, and therefore is not a place into which a writ of habeas corpus should issue out of England. (3.) That the Proclamation of December 5, 1906, whereunder Sekgome is detained at Gaberones, is valid and conclusive against the issue of the writ.

With regard to the first of these three points I venture respectfully to dissent from the opinion which was expressed by the Lord Chief Justice of England in the Divisional Court, and which formed one of the two grounds upon which his judgment for the respondent is partly founded. I cannot find in any of the proclamations from the date of the Order in Council of May 9, 1891, down to the Proclamation of December 5, 1906, the creation of any Court of justice in which Sekgome could obtain the relief which he seeks here by the issue of a writ of habeas corpus. And seeing that the same authority from which such Courts as exist in the Protectorate derive their origin and all their jurisdiction has by the Proclamation of December 5, 1906 (clause 1), ordained that "all acts done, permitted to be done, or sanctioned by the resident commissioner with the approval of the High Commissioner with regard to the detention of the said Sekgome prior to the commencement of this proclamation are hereby declared legal and valid, and no proceedings shall be taken to question the legality or validity of any such acts," and

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(clause 5) "No writ or process whatsoever calling in question the legality of the arrest, detention, or deportation of the said Sekgome, as the case may be, or any matter connected therewith shall have any effect within the Protectorate," I am at a loss to understand how the respondent can be heard to assert in the same breath that this proclamation is valid, and that there is a local Court which has authority to grant and issue a writ of habeas corpus in favour of Sekgome and to ensure its due execution. It is true that the Order in Council of May 9, 1891, does by paragraph 7 grant jurisdiction in respect of matters occurring within the Bechuanaland Protectorate to the Courts of British Bechuanaland, but it is, by the same paragraph, to be exercised only if and in such manner and to such extent as the Governor of British Bechuanaland shall by proclamation from time to time direct. In fact, he has never given any such direction.

But then comes the question which is raised in what I have called the respondent's second contention, namely, "Is Gaberones, where Sekgome is incarcerated, a place within His Majesty's dominions?" Now I have not found anywhere, nor shall I attempt to formulate, a definition of "dominions." I think that in its ordinary force—the force which it must be taken to have unless the context or other circumstances necessarily involve a different interpretation—"His Majesty's dominions" means regions over and in which His Majesty has and exercises the whole collection or bundle of separable powers (to borrow the phraseology of Sir Henry Maine) which constitute territorial sovereignty. Possibly, as seems to have been the opinion of the Court at the trial of *Reg.* v. *Jameson* (1), in regard to the use of the expression in the Foreign Enlistment Act, it may, in a certain context or in connection with a particular subject-matter, properly be interpreted as meaning something less (see the report of the Privy Council, January 27, 1899, in the case of *Staples* v. *The Queen*, a manuscript copy of which was supplied to this Court at the hearing of this case). But I see no reason to assign to the phrase less than its ordinary force when it occurs in the Habeas Corpus Act, 1862 (25 & 26 Vict. c. 20), in the preamble of the Foreign Jurisdiction Act, 1890, and in the

(1) [1896] 2 Q. B. 425.

judgment of the Court of Queen's Bench dealing with the question of the issue of the writ from the common law standpoint in the case of *Ex parte Anderson* (1), which was decided shortly before the Habeas Corpus Act, 1862, and which was, I believe, the cause of the passing of that statute. If this view is correct, the Protectorate of a foreign country in which His Majesty has and exercises power and jurisdiction as a protecting and not as a ruling Sovereign, and which he has never annexed to the possessions of the British Crown, certainly cannot properly be treated as part of His Majesty's dominions. The one and only fact, upon the evidence in the present case, which has presented to my mind any difficulty in so regarding the whole of this Bechuanaland Protectorate has been this. It appears in the evidence, and is not disputed, that in regard to a portion of that Protectorate, as established in March, 1885, and dealt with by the Order in Council of May 9, 1891, and in the subsequent proclamations made under that Order, the chiefs of the local tribes in 1904 (see the Order in Council of May 16, 1904) "abandoned all rights and jurisdiction in and over" such portion, and the last-mentioned Order defined the lands of which such portion consisted to be "Crown lands" and vested them in the High Commissioner, and that Gaberones, where Sekgome is confined, lies within this area. Further, by proclamations dated respectively February 7, 1905, June 7, 1905, and June 30, 1905, the High Commissioner, acting under the powers conferred upon him by the Order in Council of May 16, 1904, has in fact made grants of certain tracts of these "Crown lands" whilst retaining the district of and about Gaberones as "the Gaberones Crown Reserve." Now I must frankly say that I find it difficult to discern a clear line of practical distinction between such dealing with the lands in and over which the local chiefs have abandoned all rights and jurisdiction and an annexation of those lands by the Crown. But, as Lord Halsbury L.C. observed in the course of the argument of counsel in *Staples* v. *The Queen*, "I never heard that you can force a Sovereign to take territory"; and not only does the Order in Council of May 16, 1904, itself (clause 4) state "This Order may be cited as 'The

(1) 3 E. & E. 487; 30 L. J. (Q.B.) 129.

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Bechuanaland Protectorate (Lands) Order in Council, 1904,'" but the subsequent proclamations relating to these "Crown lands," to which I have referred, designate them in their preambles as certain lands "situate within the Bechuanaland Protectorate" which have been vested in the High Commissioner by the above-mentioned Order in Council. The clear inference from such language is that these Crown lands (which, as I have said, include Gaberones) have not been annexed to His Majesty's dominions, but are treated by the Sovereign as still integral portions of the Protectorate. And the affidavit sworn on December 11, 1909, of Lord Crewe, the Secretary of State for the Colonies, is quite clear and explicit upon this point. In paragraph 3 he describes Sekgome's place of detention as "Gaberones in the Bechuanaland Protectorate." And paragraph 4 runs thus: "The Bechuanaland Protectorate is a foreign country within which His Majesty has power and jurisdiction by treaty, grant, usage, sufferance, or other lawful means within the meaning of the Foreign Jurisdiction Act, 1890. The territory of the said Protectorate is foreign territory under His Majesty's protection. It has never been acquired by settlement or ceded to or conquered or annexed by His Majesty or any of his Royal predecessors, nor has His Majesty or any of his Royal predecessors recognized the same as, nor is it, part of his dominions, but he has power and jurisdiction within the same." If this be the true view, as, in my opinion, we ought to hold, and the Bechuanaland Protectorate, including Gaberones, forms no part of His Majesty's dominions, there is no authority, so far as I am aware, which would justify the issue of the writ of habeas corpus for which the appellant asks. And further, unless, as the appellant's counsel have contended, the Proclamation of December 5, 1906, under which Sekgome is detained, can be shewn to be invalid, because it can be shewn to have been an act beyond and in excess of the powers vested in the High Commissioner by the Order in Council of May 9, 1891, upon which, as appears upon the face of the preamble of the proclamation, it is expressly based, I am of opinion that we have in the evidence before us an act of State, justifying the detention of Sekgome, with which neither this nor any other

Court of law in this country is entitled to interfere. Whether there is any ground upon which the proclamation in question could reasonably be held to be ultra vires, and therefore invalid, I shall consider presently. Assuming, for the moment, that its issue and enforcement were within the powers vested in the High Commissioner by the Order in Council of May 9, 1891, we have, in my view, this position of facts. The Bechuanaland Protectorate is a foreign country within which His Majesty has jurisdiction and power, and the Foreign Jurisdiction Act, 1890, applies to the exercise of that jurisdiction and power. By s. 11 of that Act every Order in Council made in pursuance of that Act, after having been laid forthwith before both Houses of Parliament (it is not suggested by the appellant's counsel that the Order in Council of May 9 was not), acquires statutory validity, subject only to certain provisions in s. 12 as to which it is not contended by the appellant's counsel that they affect the above-mentioned Order in Council itself, though it is, I think, contended that they have some bearing upon the validity of the Proclamation of December 5, 1906.

The only possible question, as it appears to me, in regard to the application of the Foreign Jurisdiction Act, 1890, to the present case arises from the view which appears to have commended itself to that learned and careful jurist, Mr. W. E. Hall (see his Foreign Jurisdiction of the British Crown, pp. 221 and 222), that this Act contemplates jurisdiction over British subjects alone. It is not, I think, necessary for me to refer to his reasoning at length. The language of s. 2, and to some extent also the language of s. 12, sub-s. 1, certainly appear to lend some weight to his opinion. Of course, even so, there is still no question at all if, as the counsel for Sekgome contended, Sekgome is a British subject. But even if he is not, and Mr. Hall's view as to the operation of the Act is correct, I am of opinion that Sekgome as an inhabitant of the Protectorate cannot in this Court successfully impugn the validity of the Order in Council of May 9, 1891. That Order is not based solely upon statutory powers given by the Foreign Jurisdiction Act, 1890. The words of the preamble expressly state otherwise. The preamble recites: "Now therefore Her Majesty by virtue and in exercise of the

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powers by the Foreign Jurisdiction Act, 1890, or otherwise in Her Majesty vested, is pleased by and with the advice of her Privy Council to order, and it is hereby ordered as follows:" It appears to me, and, as I gather from pp. 224 and 225 of Mr. Hall's treatise to which I have just referred, it is in accordance with his views, that Her Majesty the Queen in 1891 was, independently of any statutory powers, entitled to legislate as she did by the Order in Council for the good government of the barbarous and unsettled territory which had been since 1885 under her protection.

In assuming a Protectorate the Crown takes to itself powers which, so far as they go, are identical with those which it could have in a conquered country. It can prescribe laws until Parliament chooses to legislate, and it can subject to its administration all persons upon the protected soil. "This," says Mr. Hall (from whose language I have borrowed in the preceding sentence), "is done in those Protectorates where general jurisdiction is claimed." Even if Sekgome is not a British subject, and if the view that the Foreign Jurisdiction Act, 1890, applies only to jurisdiction over British subjects is well founded, the Order in Council of May 9, 1891, has, in my view, sufficient foundation of validity against him, as an inhabitant of the territory, in the power of the Crown, subject always to parliamentary legislation and to the grant of a permanent Constitution, to legislate by Order in Council for the good government of the Bechuanaland Protectorate.

But then comes the question of the validity of the proclamation itself under and in pursuance of which Sekgome is detained. That depends manifestly upon its being a proclamation which the High Commissioner was authorized to make under the Order in Council of May 9, 1891. It was, as appears by the express terms of the preamble, intended to be made in virtue of the powers vested in the High Commissioner by that Order. What were those powers? There is, in the first place, a wide and general authority given to the High Commissioner by the second clause of the Order. He may on Her Majesty's behalf exercise all powers and jurisdiction which Her Majesty has within the geographical limits of the territory which are set out in the

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Order, and to that end may take or cause to be taker measures and do or cause to be done all such matters a as are lawful and he deems expedient in the interes Majesty's service, subject to instructions he may rec Her Majesty or through a Secretary of State. But the most important part is the grant of particular powers as to legislation and administrative action which are set out in paragraph 4 of the Order and are particularly referred to in the preamble of the proclamation. The paragraph runs thus: "In the exercise of the powers and authorities hereby conferred upon him the High Commissioner may amongst other things from time to time by proclamation provide for the administration of justice, the raising of revenue, and generally for the peace, order and good government of all persons within the limits of this Order, including the prohibition and punishment of acts tending to disturb the public peace." It would be difficult, I think, to find language more clearly expressing an intention to confide wide discretionary powers, and such a trust lays upon the trustee the duty not to shrink, if the need arises, from availing himself of those powers. They ought to receive, as Lord Halsbury L.C. insisted in delivering the judgment of the Privy Council in *Riel* v. *The Queen* (1) with respect to powers of the Canadian Parliament to legislate "for peace, order and good government," a liberal interpretation in the sense that they may rightly be held to justify provisions widely differing from those which have been made in this country for the same ends. Such an interpretation is especially just and necessary where, as is the case here, the trustee has to govern a large unsettled territory, peopled by lawless and warlike savages, who outnumber the European inhabitants by more than one hundred to one. Whatever the words "as are lawful" in clause 2 of this Order in Council mean, and they are, I think, inserted on account of s. 12 of the Foreign Jurisdiction Act, 1890, which this proclamation, in my opinion, clearly does not violate, they certainly cannot reasonably be held to limit the action of the High Commissioner to that which is in accordance with the laws in force in the England of to-day for this realm. The Proclamation of December 5, 1906, is, no

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(1) 10 App. Cas. 678.

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doubt, in regard to Sekgome, of a stern and drastic nature. It is essentially a "privilegium"—legislation directed against a particular person; and generally, as I hope and believe, such legislation commends itself as little to British legislators as it did to the legislators of ancient Rome, in the best days of the republic. "Vetant leges sacratae, vetant XII tabulae, leges privatis hominibus irrogari: id est enim privilegium. Nemo unquam tulit: nihil est crudelius, nihil perniciosius, nihil, quod minus haec civitas ferre possit": Cicero, Oratio Pro Domo Sua cap. xvii. There is a similar statement in his treatise De Legibus, lib. iii., cap. 19, §§ 44. But we have not here to consider the case of a civilized and orderly State, such as modern England or the Rome of Cicero's time, but the administration of a barbarous or, at least, semi-barbarous community. If it be true, as is recited in this proclamation, that, when this proclamation was made, the return of Sekgome to the limits of his tribe was a danger to the peace of the tribe and likely to lead to bloodshed and tribal war; if, in order to procure peace and order within the Protectorate, it was necessary to detain Sekgome at a place within the Protectorate distant from the limits of his tribe and to continue such detention; nay, if such a view of the facts was at any rate not an unreasonable view for the High Commissioner to take—and of this there is no evidence to justify the slightest doubt—it appears to me to be impossible to deny that this proclamation was a valid proclamation, not ultra vires, but within the scope of the powers and duties entrusted to the High Commissioner by the terms of the Order in Council, to provide for the peace, order, and good government of all persons within the Protectorate, including the prohibition and punishment of acts tending to disturb the public peace. I am, therefore, with due respect, unable to share the doubts which the judges in the Divisional Court have indicated in respect to the validity of this proclamation, or to see what facts relative to its validity remain in question and deserve investigation on a return being made to the writ. I venture to think that we have in this proclamation, made in virtue of the powers vested in its author by the valid Order in Council, an act of State which we are bound to respect by refusing to displace the judgment of the Divisional Court

dismissing the appellant's application for the issue of a writ of habeas corpus.

With regard to the single remaining, and quite distinct, point, which formed one of the grounds of the decision of the Divisional Court, I concur in the view which my brethren in that Court took; and that point, if it stood alone, would be sufficient to dispose of this appeal in favour of the respondent. I am of opinion that the Secretary of State for the Colonies is not a person to whom such a writ can properly be directed. It appears to me that, in the case of the executive or administrative superior of the actual custodian of the person in detention who applies for a writ of habeas corpus, it may be right and proper that the writ, if issued, should be directed to him either with or without the inclusion of the actual custodian, if that executive or administrative superior is a person whose authority the custodian must rely upon in order to justify the detention, and to whom obedience must be rendered by the custodian, if he orders a release. I am inclined to think that the High Commissioner, who is the chief executive and administrative official of the territory, is a person to whom in this present case the writ might properly have been directed. But I know of no authority, and certainly I can find no guidance of principle, to justify the appellant's contention that a writ of habeas corpus in this case can properly be directed to His Majesty's Secretary of State for the Colonies, on the ground that, if it approves itself to his conscience and judgment, it is his duty to advise His Majesty himself to give, or to authorize a Secretary of State to give, instructions to the High Commissioner to withdraw the Proclamation of December 5, 1906, and to order Sekgome's release from detention under that proclamation. But I am glad that, for the reasons which I have stated in this judgment, I can concur in the dismissal of this appeal upon other substantial grounds, and not upon this somewhat technical point alone.

Appeal dismissed.

Solicitor for appellant: *F. B. Winter.*
Solicitor for defendant: *Solicitor to the Treasury.*

F. O. R.

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SKIPPER & TUCKER *v.* HOLLOWAY AND HOWARD.

Assignment—Part of Debt—Right of Assignee to sue—Supreme Court of Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.

Under s. 25, sub-s. 6, of the Supreme Court of Judicature Act, 1873, an ascertained part of a debt can be assigned, and the assignee can sue in his own name to recover from the debtor the part of the debt assigned. (1)

By a deed of assignment so much of a debt of 125*l.* due to the assignor not exceeding 30*l.* as should cover the costs due from the assignor to the plaintiffs (a firm of solicitors) was assigned to the plaintiffs:—

Held, that the assignment was valid under s. 25, sub-s. 6, of the Judicature Act, 1873, and that the plaintiffs could sue the debtor in their own name to recover from him the portion of the debt assigned to them.

Action tried before Darling J. in the short cause list.

The action was brought to recover 30*l.*, being part of a debt of 125*l.* alleged to be due by the defendant Holloway to one Annie Howard and assigned by her to the plaintiffs. The action was originally brought against the defendant Holloway alone. The plaintiffs subsequently requested Annie Howard to consent to her being joined as a co-plaintiff, but, failing to obtain her consent, they, pursuant to an order of a Master, amended the writ by adding her as a defendant.

The material facts were as follows: By an agreement dated August 31, 1908, the defendant Annie Howard became tenant of a house at Richmond, Surrey, for five years from September 29, 1908, the defendant Holloway being also a party to the lease as guarantor of the due performance by the defendant Howard of her obligations under the lease. Disputes arose between the defendants with regard to the tenancy of the house and other matters, which eventually led to proceedings being taken by the defendant Howard in the Richmond police court against the defendant Holloway and others for assault. These proceedings were terminated by the justices allowing the summonses to be withdrawn upon the defendant Holloway agreeing to pay the defendant Howard 125*l.*, and she agreeing to assign to the

(1) But see post, p. 636.

defendant Holloway the lease of the house and to release all her other claims. In these proceedings the defendant Howard employed the plaintiffs, a firm of solicitors, to act for her. The assent of the landlords to the assignment of the lease of the house was obtained. The assignment of the lease was executed by the defendant Howard, but was never delivered to the defendant Holloway nor executed by him, nor was the 125*l.* paid by the defendant Holloway to the defendant Howard, as they became reconciled. On June 2, 1909, the defendant Howard executed a deed of assignment which, after reciting that she was indebted to the plaintiffs for their costs and charges in connection with the police court proceedings, continued: "And whereas the vendor" (the defendant Howard) "has contracted and agreed with the purchasers" (the plaintiffs) "for the absolute sale to them of so much of the said debt of one hundred and twenty-five pounds due from the said Clarence Morgan Holloway as aforesaid as will cover all their proper costs charges and expenses against the vendor not exceeding in the whole the sum of thirty pounds Now this indenture witnesseth that in consideration of the indebtedness of the vendor to the purchasers as aforesaid the vendor as beneficial owner doth hereby assign to the purchasers so much of the said debt of one hundred and twenty-five pounds due from the said Clarence Morgan Holloway to her as aforesaid not exceeding the sum of thirty pounds as shall cover the purchasers' proper costs charges and expenses owing to them by" her. The plaintiffs gave notice in writing of the assignment to the defendant Holloway. Their charges against the defendant Howard amounted to 32*l.*, being 34*l.* 2*s.*, the amount of their bill of costs, less 2*l.* 2*s.* received on account. The defendant Howard had not had the bill taxed. The plaintiffs claimed against the defendant Holloway 30*l.* as part of the debt owing by him to the defendant Howard and assigned by her to them by the deed of June 2, 1909.

The plaintiffs applied under Order XIV., r. 1, for leave to enter final judgment for the amount indorsed on the writ. Leave to defend was given and the case set down for trial under Order XIV., r. 8.

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Bromley Eames, for the plaintiffs.

R. F. Colam, for the defendant Holloway. The plaintiffs' remedy is either an action for specific performance or damages, and proceedings under Order XIV. are therefore not applicable. A portion of a debt cannot be assigned under s. 25, sub-s. 6, of the Judicature Act, 1873. It is true that in *Brice* v. *Bannister* (1) Lord Coleridge C.J. held that a part of a debt could be assigned under the Act of 1873, but his decision was doubted by Chitty L.J., and the point was left open by Collins L.J. in *Durham Brothers* v. *Robertson* (2), and doubts were also expressed upon the question by Mathew L.J. in *Hughes* v. *Pump House Hotel Co.* (3) In *Jones* v. *Humphreys* (4) it was held that there cannot be a valid assignment of an unascertained part of a debt. In the present case there was no ascertained part of the debt at the time of the assignment, as the defendant Howard's solicitors had not delivered their bill of costs, and even when delivered the amount due to the solicitors was not ascertained, as the bill was subject to taxation. The action cannot be supported on the ground that there was a good equitable assignment to the plaintiffs. A claim at law founded upon an equitable assignment must be made in the name of the assignor, but the present action is brought in the name of the assignees. The plaintiffs are attempting to enforce an assignment of a right of action for damages. That assignment is invalid, as it constitutes champerty. There was no debt or other legal chose in action capable of assignment, and there was, therefore, no debt of which the defendant Howard could assign a part: *May* v. *Lane*. (5)

Bromley Eames in reply. Under s. 25, sub-s. 6, of the Judicature Act, 1873, a portion of a debt can be assigned: *Brice* v. *Bannister* (1); *Tailby* v. *Official Receiver*. (6) In *Jones* v. *Humphreys* (4) the portion attempted to be assigned was not definite, but in the present case there was a defined portion of the debt of 125*l*. assigned to the plaintiffs, namely, a portion of it, not exceeding 30*l*., equal to the amount in fact owing by the defendant Howard to the plaintiffs.

(1) (1878) 3 Q. B. D. 569.
(2) [1898] 1 Q. B. 765.
(3) [1902] 2 K. B. 190.
(4) [1902] 1 K. B. 10.
(5) (1894) 64 L. J. (Q.B.) 236.
(6) (1888) 13 App. Cas. 523.

Even if the assignment cannot be supported under s. 25, sub-s. 6, of the Judicature Act, 1873, it is valid as an equitable assignment. The assignor was joined as a defendant in consequence of her not consenting to be joined as a plaintiff. All parties are therefore before the Court: *Bowden's Patents Syndicate* v. *Smith & Co.* (1)

The defendant Howard had done everything she was bound to do under the agreement of compromise, and her claim against the defendant Holloway was therefore for debt, not for specific performance. The present action is therefore brought upon an assignment of a definite portion of a debt. [*Hutchinson* v. *Heyworth* (2) and *Alexander* v. *Steinhardt, Walker & Co.* (3) were also referred to.]

DARLING J. I am of opinion that the plaintiffs are entitled to succeed. Disputes arose between the two defendants. Legal proceedings took place between them in the police court and terminated in an arrangement that the defendant Holloway should pay the defendant Howard a sum greatly in excess of that for which the plaintiffs are suing. The defendant Howard had engaged the plaintiffs to act as her solicitors in the police court proceedings. They delivered to her a bill of costs which she has not yet had taxed. She executed an assignment to the plaintiffs of a part of what is alleged to be a debt due to her from the defendant Holloway, the debt being the sum agreed to be due from him to her on the settlement of the proceedings in the police court, a sum very much in excess of the 30*l.* alleged by the plaintiffs to have been assigned to them. On behalf of the defendant Holloway it is contended that an assignment of part of a debt is bad. That point arose in *Brice* v. *Bannister.* (4) The judgment of Lord Coleridge C.J. in that case has been very much discussed and commented upon. In the present state of the authorities it is impossible to say that there is any express decision upon the point. Indeed it was expressly reserved in *Jones* v. *Humphreys.* (5) In giving judgment in that case I said:

(1) [1904] 2 Ch. 86.
(2) (1838) 9 Ad. & E. 375.
(3) [1903] 2 K. B. 208.
(4) 3 Q. B. D. 569.
(5) [1902] 1 K. B. 10.

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Darling J.

"But even if the sum had been ascertained, I think, having regard to the expression of opinion by Chitty L.J. in *Durham Brothers* v. *Robertson* (1), it is extremely doubtful whether the assignment, being of part of a debt only, would come within the Act." Channell J. said: "I do not think it necessary to decide the point which was left open in *Durham Brothers* v. *Robertson* (1), as to whether the assignment of part of a debt can come within the section." Therefore in *Jones* v. *Humphreys* (2) no decision was given upon the point, and it was expressly left open in *Durham Brothers* v. *Robertson*. (1) It therefore now becomes necessary to decide this question which has hitherto been left open. It is quite clear that there may be an absolute assignment of a future debt, and I think that that affords assistance in deciding the question whether there can be an assignment of a portion of a debt. If a future debt can be assigned, it follows that an assignment may be good where it is impossible to say exactly what the amount of the debt may be at the time of the assignment. A future debt does not exist at the time of the assignment, and therefore it is not necessary that there shall be a present debt of an exact amount in order that it may be validly assigned. *Walker* v. *Bradford Old Bank* (3) is an authority for the proposition that there can be a legal assignment of a future debt, and in giving judgment in *Jones* v. *Humphreys* (2) Lord Alverstone C.J. said: "I think there is no doubt that an absolute assignment of future debts may be a good assignment for the purposes of the section, and I also think that an absolute assignment of a definite sum out of a future debt may possibly be within the section. But I think that an assignment of an undefined portion of future debts will not come within it." In the present case, assuming that there was a debt, it was an existing and not a future one. I have come to the conclusion that if there was an existing debt an ascertained portion of it could be validly assigned. I am of opinion that there was an ascertained sum which could be legally assigned as a portion of an existing debt.

There remains the question whether there was an existing debt due from the defendant Holloway to the defendant Howard

(1) [1898] 1 Q. B. 765. (2) [1902] 1 K. B. 10.
(3) (1884) 12 Q. B. D. 511.

at the date of assignment. Having regard to the correspondence and to the deeds executed by the defendant Howard, I am of opinion that there was an existing debt due to the defendant Howard from the defendant Holloway at the time the assignment of a portion of it was made by the defendant Howard to the plaintiffs. There was an existing debt due to the defendant Howard from the defendant Holloway greatly exceeding the sum assigned. The whole of the existing debt was not assigned, but a portion of it, namely, 30*l.* In my judgment there was an existing debt of 125*l.* and an ascertained portion of it was assigned to the plaintiffs. I am of opinion that that was a valid assignment under s. 25, sub-s. 6, of the Judicature Act, 1873.

But even if that is not so, I think that the order of the Master adding the defendant Howard as a party is sufficient to enable me to say that there was a good equitable assignment; yet I do not desire to base my judgment upon that ground. As it seems necessary to decide a point which has hitherto been questioned by eminent judges and which they were reluctant to decide, I have done so to the best of my ability. There must be judgment for the plaintiffs for 30*l.*, or for such less sum as may be found to be due upon the bill on taxation.

Judgment for plaintiffs. (1)

Solicitors for plaintiffs: *Skipper & Tucker.*
Solicitor for defendant Holloway: *H. S. Foy.*

(1) The defendants appealed against the judgment of Darling J. in this case. Upon the hearing in the Court of Appeal (March 11, 1910) the Court (Earl of Halsbury, Fletcher Moulton L.J., and Farwell L.J.) held that the result of the facts proved (which are not stated in full detail in the above report, but only so far as material for the purposes of the point of law reported) was that the supposed debt, part of which was alleged to have been made the subject of assignment, never came into existence at all, and therefore the question whether there could be a valid assignment at law of part of it did not arise. They therefore allowed the appeal, without giving any decision on that question.

J. E. A.

K. B. D.
1910
Jan. 24, 25.
C. A.
1910
April 20.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

FORSTER *v.* BAKER.

Judgment Debt—Assignment of Part—Rights of Assignee—Leave to issue Execution—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.

A judgment creditor having assigned part of the judgment debt for valuable consideration, the assignee applied under Order XLII., r. 23, for leave to issue execution :—

Held by Bray J. and by the Court of Appeal, that the assignee was not entitled to such leave.

By Bray J. on the ground that there cannot be an absolute assignment within s. 25, sub-s. 6, of the Judicature Act, 1873, of a definite part of an existing debt or other legal chose in action.

By the Court of Appeal on the ground that, as the original judgment creditor could only issue a single execution upon his judgment, and could not split up the judgment debt and issue separate executions upon the different parts, he could not give to an assignee of a part of the judgment debt a right which he did not himself possess.

APPEAL of the plaintiff from the decision of Bray J. upon a special case.

On December 21, 1908, one Bowles recovered judgment against the defendant Baker for 675*l.* 15*s.* 5*d.* By an indenture dated May 14, 1909, Bowles assigned to Forster "all that the said judgment debt due" from Baker to Bowles "to the extent of 560*l.* thereof to hold the same unto" Forster "absolutely." Notice of the assignment was given to Baker. On May 28, 1909, Forster obtained leave ex parte to issue execution on the judgment of December 21, 1908, and then issued a bankruptcy notice against Baker. On July 19, 1909, on a summons to set aside the order giving leave to issue execution, it was ordered that the said order should be discharged, and that the issue whether Forster was entitled to leave to issue execution should be determined by means of a special case. In this issue Forster was made plaintiff and Baker defendant. (1)

(1) The case also raised a question as to whether the judgment debt had been paid. This question was entirely one of fact, and it became unnecessary for the judge to decide it. So much of the case and of the arguments as related to this question has, therefore, been omitted from this report.

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Shearman, K.C., and *Tindale Davis*, for the plaintiff. An assignment of part of a judgment debt is a valid assignment under s. 25, sub-s. 6, of the Judicature Act, 1873. The object of that sub-section was to give in the case of legal debts the same facilities of assignment as had previously existed in the case of equitable debts: *Torkington* v. *Magee*, per Channell J. (1); *King* v. *Victoria Insurance Co.* (2) Before the Judicature Act, 1873, there could have been a good equitable assignment of part of a chose in action; and the decision of the House of Lords in *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (3) shews that if the document sued on is a good equitable assignment the assignee can now sue on it in his own name without joining the assignor. *Skipper & Tucker* v. *Holloway* (4), decided by Darling J., is the only authority directly in point and is in the plaintiff's favour. [They also referred to *Durham Brothers* v. *Robertson* (5), *Jones* v. *Humphreys* (6), and *Brice* v. *Bannister*. (7)]

Hansell and *Schwabe*, for the defendant. *Skipper & Tucker* v. *Holloway* (4) was wrongly decided and being a nisi prius decision is not binding on the Court in this case. The point which impressed Darling J. was that there can be an assignment of a future debt, but there is no analogy between that and the assignment of part of an existing debt. The plaintiff's contention involves adding to the words "legal chose in action" in s. 25, sub-s. 6, the words "or any part thereof." The Legislature has not used those words, and it cannot be presumed that the Legislature intended, as Chitty L.J. said in *Durham Brothers* v. *Robertson* (5), "to leave it in the power of the original creditor to split up the single legal cause of action for the debt into as many separate legal causes of action as he might think fit," to be followed, in the case of the assignment of parts of a judgment debt, by an equal number of executions or bankruptcy petitions. The section not having in terms said that part of a debt can be assigned, it should not be construed as having that meaning by implication,

(1) [1902] 2 K. B. 427.
(2) [1896] A. C. 250.
(3) [1905] A. C. 454.
(4) Ante, p. 630.
(5) [1898] 1 Q. B. 765.
(6) [1902] 1 K. B. 10.
(7) (1878) 3 Q. B. D. 569.

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having regard to the hardship and oppression which would result to the debtor. [*Walker* v. *Bradford Old Bank* (1) and *Hughes* v. *Pump House Hotel Co.* (2) were referred to.]

Tindale Davis replied.

BRAY J. This case raises two questions. The first is, whether the assignment of part of a judgment debt comes within s. 25, sub-s. 6, of the Judicature Act, 1873, so as to transfer that part of the debt with all its remedies to the assignee. The second question is one of fact, namely, whether there has been a payment of the judgment debt.

With regard to the first question, the authorities that have been cited are all referred to in the judgment of Darling J. in *Skipper & Tucker* v. *Holloway*. (3) Opinions have been expressed in those authorities on this point, but they are opinions only and not decisions; and it is clear that when the question came before Darling J. there was no binding authority. He has undoubtedly decided the point in a case which came before him at nisi prius. The first question which arises is, am I bound by his decision? I have always understood that one judge is not bound by the decision of another judge on a point of law at nisi prius, and, therefore, I think I am bound to consider the case and to decide it according to my own opinion, at the same time, of course, giving great weight to the decision of Darling J.

The question is whether there can be an absolute assignment of part of a debt within s. 25, sub-s. 6, of the Judicature Act, 1873. It seems to me that the language of that sub-section prima facie has reference to a whole debt or chose in action. It is said that the language is wide enough to include part of a debt. I will assume for a moment that that may be so. What ought I then to consider? In my opinion I ought to consider what the results would be of holding that there can be a valid legal assignment of part of a debt, and whether those results are such as are contemplated by the section. Now, I do not think it was intended to throw any greater burden on the debtor

(1) (1884) 12 Q. B. D. 511. (2) [1902] 2 K. B. 190.
(3) Ante, p. 630.

than had previously existed. The position formerly of a debtor as regards a legal debt which had been assigned was that an action could be brought against him, but the assignor, except in certain exceptional cases, was a necessary party to the action either as plaintiff or defendant, in order that he might be bound, as well as the debtor and the assignee, by the decision of the case. I should certainly assume, although I do not know of any authority to that effect, that if a part of a debt had been assigned to A. and another part to B., and A. had brought an action to recover his part, he would have been obliged not only to make the assignor a party, but B. also, so that there would be one action which would decide the relationship of the debtor to each of the persons who owned a part of the debt, and the question would be decided once for all between all the parties. But if an absolute assignment of part of a debt is valid under s. 25, sub-s. 6, the consequence is that the assignee is able to sue the debtor without joining the assignor or the assignee of the other part of the debt, if there have been two assignments; and it might happen that if the debt had been split up into two, three, or four parts, there might be two, three, or four actions with different results. All sorts of difficulties would arise, and a great burden, an unnecessarily great burden, would be placed upon the debtor. In the case of a judgment debt that consideration applies with even greater force, because the remedy on a judgment debt is execution, and the result would be that if a judgment debt was divided into, say, three or four parts, each of which was assigned to a different person, there might be three or four executions, and three or four petitions in bankruptcy, and the debtor might be considerably and unnecessarily harassed. These considerations, in my opinion, point to the fact that I ought not, unless compelled by the language of the section, to construe the words "legal debt or chose in action" as including part of a legal debt or part of a chose in action. I think some consideration should also be given to the fact that s. 25, sub-s. 6, deals only with absolute assignments and not with assignments by way of charge. For these reasons I should, apart from authority, come to the conclusion that the assignment of part of a debt or part of a legal chose in action is not within s. 25, sub-s. 6.

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Bray J.

I pass to the consideration of the decision of Darling J. in *Skipper & Tucker* v. *Holloway* (1), and, as I have said, I am bound to give great weight to that decision, because he had all the authorities cited to him and he considered the matter. The ground of his decision appears, I think, from the following passages in his judgment :—" It is clear that there can be an absolute assignment of a future debt." I agree that that is so, but it is important to remember that the reason is that an assignment of a future debt was considered in equity to amount to a contract to assign that debt, and when the debt had accrued due and become ascertained, equity treated the agreement to execute an assignment as an assignment, and, therefore, it became then, and not till then, an assignment of the debt. But no action could be brought against the debtor until the debt was due, and the Judicature Act gave the same right to the assignee then as he would have had if the debt had existed at the time of the original assignment. Darling J. went on to say : " That helps very considerably in deciding whether there can be an assignment of a portion of a debt, because in the case of an assignment of a future debt it is impossible to say what the amount of the future debt may be at the time of the assignment, as it does not exist at that time." The answer to that is that before any action could be brought or before an assignee can take advantage of the provisions of sub-s. 6 the debt must be absolutely due. " It is, therefore, not necessary that there should be an existing debt of an exact amount in order that it may be validly assigned." It seems to me that the reason given by Darling J. for his decision is an insufficient reason, and he does not appear to have considered the great and unnecessary and, as it seems to me, unfair burden which would be thrown on a debtor by holding that there can be an absolute assignment of part of a debt within the section. Certainly Darling J. did not consider the case of a judgment debt, upon which leave to issue execution might, according to the contention of the present plaintiff, be applied for and granted to two or more different persons. I therefore hold that there cannot be an absolute

(1) Ante, p. 630. The passages in the judgment of Darling J. were cited from the *Law Journal* report, 79 L. J. (K.B.) 91.

assignment within s. 25, sub-s. 6, of part of a debt or legal chose in action, and inasmuch as a judgment debt is a debt or legal chose in action, it follows that part of a judgment debt cannot be the subject of an assignment within the section.

The other question is a difficult question of fact, and as it now becomes unnecessary for me to decide it, I prefer to express no opinion upon it.

In answer to the question in the case I say that Elizabeth Josephine Forster is not entitled to leave to issue execution on the judgment.

Judgment for defendant.

F. O. R.

The plaintiff appealed.

April 20. *Shearman*, *K.C.*, and *Tindale Davis*, for the plaintiff, argued as in the Court below. They also referred to *Goodman* v. *Robinson*. (1)

Hansell and *Schwabe*, for the defendant, were not called on.

VAUGHAN WILLIAMS L.J. I think that this appeal fails. I will deal with only one of the points discussed before us; upon others I feel some doubt, and I will not pronounce any judgment upon them. A judgment creditor could not before the coming into operation of the Judicature Act, 1873, have issued a series of small executions upon his judgment making in the whole the total amount of the judgment debt; he had only one judgment, and upon that judgment he could issue only one execution; he has only the same right now. And if a judgment creditor assigned part of his judgment debt, he could not then, and cannot now, give to his assignee any better right than he had himself. The result is, therefore, that the assignee of part of a judgment debt is not in a position to issue execution upon it, which is what the plaintiff in the issue wishes to do in the present case.

FLETCHER MOULTON L.J. I am of the same opinion. I do not wish to decide any unnecessary questions, and therefore I

(1) (1886) 18 Q. B. D. 332.

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desire especially to guard myself against being supposed to have expressed a final opinion upon one of the questions raised; but I may say that at present I am not prepared to hold without further argument that the assignee of the whole of a judgment debt is in the same position with regard to it as the original judgment creditor. I do not forget the decision of the Divisional Court in *Goodman* v. *Robinson* (1), but, if that decision should in the future come before the Court of Appeal for review, I think that it will require careful examination. Confining myself to that which is necessary for my decision in the present case, I am of opinion that the assignee of part of a judgment debt never has been, and still is not, in the position of an execution creditor with regard to that part; the original judgment creditor cannot divide his judgment and issue several executions upon it for the amounts into which he chooses to divide it, and he cannot assign to another a power which he does not himself possess. Even on the broadest construction that can be given to the language of s. 25, sub-s. 6, of the Judicature Act, 1873, the remedy of which the appellant seeks to avail herself is not a legal remedy within the meaning of that sub-section.

FARWELL L.J. I agree.

Appeal dismissed.

Solicitors for plaintiff: *Sparks & Russell.*
Solicitors for defendant: *Blair & W. B. Girling.*

(1) 18 Q. B. D. 332.

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1910
June 22.

BENNETT *v.* WHITE.

Set-off—Mutual Debts—Assignment to Defendant of Debt owed by Plaintiff to Third Person—Set-off by Defendant of assigned Debt against Plaintiff's Claim—Practice—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.

In an action to recover a debt due from the defendant to the plaintiff, the defendant is entitled to set off a debt originally due from the plaintiff to a third person who has assigned it to the defendant.

Decision of the Divisional Court (ante, p. 1) reversed.

Appeal from the decision of a Divisional Court. (1)

The question on this appeal was whether the defendant in an action for debt was entitled to set off, against the plaintiff's claim, a debt due from the plaintiff to a third person who had assigned it to the defendant in writing with notice to the plaintiff.

The action was brought in the Mayor's Court on May 17, 1909, to recover the sum of 31*l.* for money payable by the defendant to the plaintiff for work done (printing) and materials provided by the plaintiff for the defendant at his request. The debt sued for was not disputed by the defendant, but it appeared that the plaintiff on May 5, 1909, was indebted to one Burton in the sum of 31*l.* for commission due from him to Burton.

By a deed of assignment dated May 5, 1909, Burton absolutely assigned to the defendant the debt of 31*l.* which was due to him from the plaintiff and gave notice of the assignment in writing to the plaintiff on the same day.

By his amended plea the defendant claimed the right to set off the debt so assigned to him against the plaintiff's claim.

The Recorder held that the debt assigned by Burton to the defendant could not be the subject of a set-off and gave judgment for the plaintiff for 31*l.* The defendant appealed to the Divisional Court, who confirmed the Recorder. From their decision the defendant appealed.

Atkin, K.C., and *J. P. Valetta*, for the appellant. It is said that the debts in this case are not "mutual debts" because the

(1) Ante, p. 1.

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debt which the defendant seeks to set off was not originally due as between the plaintiff and the defendant. That is a fallacy. By virtue of the assignment the plaintiff's debt to Burton became a debt due to the defendant and it is not necessary to go into its pedigree. "Mutual debts" exist where the plaintiff owes a debt to the defendant and the defendant owes one to the plaintiff.

[He was stopped by the Court.]

Hon. E. A. Harney, for the respondent. The statutory right of set-off does not extend to a debt like that in the present case, which was originally due from the plaintiff to a third party. The proper way for the defendant to obtain credit for this debt was to set it up by way of counter-claim. Sect. 25, sub-s. 6, of the Judicature Act, 1873, did not enlarge rights so as to enable the assignee of a debt to set it up as a defence by way of set-off. It merely enabled the assignee to sue in his own name. The right of set-off is limited to the case of persons who have contracted directly one with the other. The statutes of 2 Geo. 2, c. 22, and 8 Geo. 2, c. 24, provided a limited form of meeting one debt by another. The Judicature Act, 1873, gave an extended form of doing the same thing by way of counter-claim. It did not extend the right of set-off.

In *Rees* v. *Watts* (1) Coleridge J., in discussing the statute 2 Geo. 2, c. 22, said that the simplest case of mutual debts was "that of mutual debts between two living persons—that is, of debts existing between them, contracted respectively in their individual character"; and then, referring to the case of one of these mutual debtors dying and being represented by an executor or administrator, he said: "In this latter case, it is quite as necessary as in the former, that the debts should originally have existed between the two living parties." There was no need of the special provision in the statute as to the case of an executor if it was sufficient merely to shew a right of action in the plaintiff and a right of action in the defendant.

[FARWELL L.J. referred to *Cockrane* v. *Green*. (2)]

If the Court should be against the plaintiff as to the right of

(1) (1855) 11 Ex. 410, 414. (2) (1860) 30 L. J. (C.P.) 97.

set-off the action should go back to the Recorder, because owing to the way in which the case was dealt with the plaintiff has had no opportunity of proving, as he could, that in reality nothing was due from him to Burton, and therefore that in effect nothing was assigned to the defendant.

No reply was called for.

COZENS-HARDY M.R. This appeal raises a point of some importance; but I am bound to say that if the Divisional Court had not taken a different view I should not have considered it a point of any difficulty. The plaintiff Bennett sued the defendant in the Mayor's Court for a debt admitted to be due. The defendant by his pleading raised this case. He said "I have the right of set-off, for Bennett owed Burton more than 31*l.*, and Burton has assigned that debt to me, and you have had notice of it, and I plead the right of set-off." The learned Recorder held that the assigned debt could not be the subject of a set-off. He referred to the Annual Practice, in which there is a quotation from a judgment of mine in the case of *Tolhurst* v. *Associated Portland Cement Manufacturing Co., Ld.* (1), which I understand was supposed to give some support to that view. The passage is that in which I said this (2): "Now, this section relates to procedure only. It does not enlarge the class of choses in action, the assignability of which was previously recognized either at law or in equity." I do not desire to qualify in any shape or form what I there said. I think that it is correct. But both the learned Recorder and the Divisional Court have forgotten that although the right of set-off depends upon statutes (2 Geo. 2, c. 22, and 8 Geo. 2, c. 24), yet we cannot overlook that there is a subsequent statute which has materially altered the position of the assignee of a debt.

At the time of the statute 2 Geo. 2, c. 22, such a thing as an assignment of a debt was unknown and unrecognized by the common law. Then came the Judicature Act, 1873, and that statute by s. 25, sub-s. 6, says this: "Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action,

(1) [1902] 2 K. B. 660. (2) Ibid. at p. 676.

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of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor."

Now what is the effect of that? It seems to me that the construction of it does not allow of doubt. When once an assignment of a debt is made in writing and notice is given to the debtor, the assignee has a legal right of action against the debtor to the same extent as the assignor had. The debtor is protected by the express provision that the assignment is to be "subject to all equities." The assignee has a full and absolute right to say that the debt is his debt for all purposes including the purposes of the Statutes of Set-off. The debt is for all purposes in the same position as if it had been the original debt of the assignee. If authority were wanted I think that what was said by Lord Esher M.R. in *Read* v. *Brown* (1) is conclusive. He says (2), dealing with this very sub-section, "In construing s. 25, sub-s. 6, we must adopt the ordinary rule as to the construction of Acts of Parliament, that of giving, if possible, a meaning to each word. Now the defendant's argument comes to this, that the 'legal right' to a debt is the same thing as the 'legal and other remedies' for it, but if that is a correct argument, the provision that the assignment shall transfer 'the legal right to the debt' is mere tautology, and the section must be read as if the words were not there. That is a wrong rule of construction; the words mean what they say; they transfer the legal right to the debt as well as the legal remedies for its recovery. The debt is transferred to the assignee and becomes as though it had been his from the beginning; it is no longer to be the debt of the assignor at all, who cannot sue for it, the right to sue being taken from him; the assignee becomes the assignee of a legal

(1) (1888) 22 Q. B. D. 128. (2) Ibid. at p. 132.

debt and is not merely an assignee in equity, and the debt being his he can sue for it and sue in his own name."

I think therefore that this is a case which we must treat exactly the same as if it had been under the statute 2 Geo. 2, c. 22, a case in which the defendant had at the time when he was sued a debt originally due to him from the plaintiff himself.

With great respect to the learned Recorder and the Divisional Court I think, as I have already said, that they have overlooked the effect of s. 25, sub-s. 6, of the Judicature Act, 1873, which expressly provides, for the protection of the debtor, that all equities are to be preserved. I think therefore that the point upon which this case was decided was a bad point, and that the plea raised by the defendant was in law a good plea. The Divisional Court took a wrong view on that point, and the order of the learned Recorder giving judgment for the plaintiff simply for 31*l.* and disregarding the plea must be set aside, and the order of the Divisional Court also, and the present appellant must have the costs both in the Divisional Court and here. There is a difficulty in doing anything more than that because it appears, as was stated by Mr. Harney, and admitted by Mr. Atkin, that the learned Recorder on the second day of the trial said that he had made up his mind on the point that there could not be a set-off of the assigned debt; and therefore Mr. Harney had not the opportunity of re-examining the plaintiff in order to shew that the amount said to be due from the plaintiff to Burton was not really due. I think therefore that the case must go back to the learned Recorder for rehearing.

FARWELL L.J. I am of the same opinion. With great respect to the Divisional Court they have, I think, overlooked the words of s. 25, sub-s. 6, of the Judicature Act, 1873, "subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed." In this case no injustice will be done. The learned judges seem to have thought that it is necessary to trace the pedigree of the assigned debt. But there can be nothing to that effect in the older cases because there was no means of assigning a debt at law before the

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Farwell L.J.

Judicature Act. The form of plea given in Bullen and Leake's Precedents, 3rd ed., p. 682, is "That the plaintiff *at the commencement of the suit* was and still is indebted to the defendant in an amount equal to the plaintiff's claim . . . ." That was at that time and always has been the proper form.

Here the case is subject to the provisions of the Judicature Act, 1873, under which an absolute assignment of a debt constitutes a good assignment of the debt at law.

I think that not only the dicta in *Read* v. *Brown* (1) but also the actual decision there covers the present case. In that case the plaintiff brought an action in the Mayor's Court as assignee of a debt alleged to be due for goods sold and delivered to the defendant by the assignor. The sale and delivery had taken place without the city of London, but the debt had been assigned in writing to the plaintiff within the city of London, and it was held that the assignment was part of the cause of action and that the cause of action having arisen in part within the city of London the plaintiff was entitled to sue in the Mayor's Court. If s. 25, sub-s. 6, of the Judicature Act, 1873, had the very limited meaning which the Divisional Court have attributed to it the decision of the Court of Appeal in the case of *Read* v. *Brown* (1) must have been otherwise. I agree with the judgment pronounced by the Master of the Rolls.

KENNEDY L.J. I also agree. I must say, speaking for myself, that in a case like the present in which such a small sum is involved I should be sorry if it could be held that this particular defence was a valid one. But I am further of opinion, as are the other members of the Court, that this is not the right view to take. In my opinion there clearly can, as the law now stands, be a set-off of a debt arising as in the present case. "Mutual debts" mean practically debts due from either party to the other for liquidated sums, or money demands which can be ascertained with certainty at the time of pleading. This was so in the present case, and the passage which has been read from the judgments in the case of *Read* v. *Brown* (1) covers the whole ground apart from any other authority.

(1) 22 Q. B. D. 128.

In my opinion we cannot do more than the Master of the Rolls has said.

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Appeal allowed.

Solicitor for appellant: *M. Perkins.*
Solicitors for respondent: *Moeran & Co.*

G. A. S

[IN THE COURT OF APPEAL.]

C. A. 1910 *June* 2, 3,

THE BOARD OF TRADE *v.* THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED.

Bankruptcy—Trustee—Fidelity Bond—Surety — Default of Trustee — Penal Interest—Liability of Surety—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 74, *sub-s.* 6.

A trustee in bankruptcy and his surety entered into a bond with the Board of Trade in the sum of 500*l.* (afterwards reduced to 100*l.*) for the due performance by the trustee of his duties as trustee, subject to a condition avoiding the bond if the trustee should "well and sufficiently perform and execute all and singular the duties required of him as trustee by the Bankruptcy Acts, 1883 and 1890," or if he should fail therein and the surety should "make good any loss or damage occasioned by any such default to the estate of the said bankrupt." The trustee improperly retained for some years a sum of money exceeding 50*l.*, and, on his default being discovered, he was removed from his office, and, pursuant to s. 74, sub-s. 6, of the Bankruptcy Act, 1883, he was surcharged with interest at the rate of 20 per cent. per annum on the sum he had improperly retained. The trustee made good the sum he had improperly retained, but did not pay the interest with which he had been surcharged:—

Held, that the interest surcharged was in the nature of a penalty and was not a measure of the loss or damage to the estate occasioned by the default of the trustee, and that the surety was not liable under the terms of the bond to pay to the Board of Trade the penal interest or any part of it.

Decision of Phillimore J., [1910] 1 K. B. 401, reversed.

APPEAL of the Employers' Liability Assurance Corporation from the decision of Phillimore J. upon a special case stated by consent under Order xxxiv., reported [1910] 1 K. B. 401. The case raised the question whether the surety of a trustee in bankruptcy under the usual fidelity bond was liable for the penal

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interest with which the trustee had been surcharged by the Board of Trade under s. 74, sub-s. 6, of the Bankruptcy Act, 1883. The facts are set out in detail in the report of the case in the Court below. The following summary will be sufficient for the purpose of this report.

On April 28, 1894, a receiving order was made against a debtor, and on May 23, 1894, she was adjudicated bankrupt. At a creditors' meeting an accountant was appointed trustee in the bankruptcy, and his appointment was duly certified by the Board of Trade.

By a bond dated June 4, 1894, the trustee with his surety, the Employers' Liability Assurance Corporation, Limited, became jointly and severally bound to the Board of Trade in the sum of 500*l.* for the purpose of securing the due performance by the trustee of the duties required of him as such trustee, subject to a condition for avoiding the bond "if the said trustee shall and do from time to time well and sufficiently perform and execute all and singular the duties required of him as trustee by the Bankruptcy Acts 1883 and 1890 or any general rules made or hereafter to be made under such Acts or if the said trustee shall fail therein and the said corporation shall make good any loss or damage occasioned by any such default made after the date hereof to the estate of the said bankrupt including so much of the costs of the removal of the defaulting trustee and the appointment of his successor as shall be in excess of the amount which in the opinion of the Inspector-General in Bankruptcy shall represent the value of the work done by the defaulting trustee for which he shall not have received remuneration to the extent of 500*l.* this obligation shall be void or otherwise shall remain in full force and virtue."

By an instrument under seal dated May 21, 1908, it was agreed that the corporation should be liable "to make good any loss or damage occasioned by the default of the said trustee subsequent to June 4, 1908, only to the extent of 100*l.* in lieu of the sum of 500*l.* . . . ."

In September, 1900, the trustee entered into a contract for the sale of certain copyhold property of the bankrupt for the sum of 305*l.* and received a sum of 30*l.* 10*s.* as deposit. In October,

1900, the sale was completed, and the trustee received a further 274*l.* 2*s.*, the balance of the purchase-money after allowing for certain outgoings. In the verified account of his receipts and payments for the period ending October 28, 1900, sent to the Board of Trade, the trustee disclosed the receipt of the 30*l.* 10*s.*, and in his next account, for the period ending June 18, 1901, he disclosed the receipt of a further sum in December, 1900, of 125*l.* on account of the sale of the copyhold property; he failed to account for 149*l.* 2*s.*, the balance of the purchase-money received by him, until the date hereafter mentioned.

In 1907 the trustee applied for his release, and was required to explain the fact that he had only accounted for 155*l.* 10*s.* in respect of the purchase-money. He eventually admitted the receipt of the whole of the money, and in August, 1908, he paid to the credit of the Bankruptcy Estates Account 149*l.* 2*s.*, the sum he had not accounted for.

In September, 1908, the Board of Trade removed the trustee from his office upon the ground that he had retained a sum of more than 50*l.* for more than ten days, contrary to the provisions of s. 74 of the Bankruptcy Act, 1883 (1), and had failed to explain such retention to the satisfaction of the Board of Trade. They also surcharged the trustee with interest on so much of the sum retained as exceeded 50*l.* at the rate of 20 per cent. per annum for the period during which it was retained in excess of ten days, and this penal interest amounted to 155*l.* 3*s.* 7*d.* The trustee having failed to pay this sum, the Board of Trade called upon the corporation "to pay the sum of 100*l.* towards the loss or damage occasioned to the estate of the bankrupt by the said default in accordance with" the bond of 1894 and the memorandum of agreement of 1908. The corporation denied

(1) By 46 & 47 Vict. c. 52 (The Bankruptcy Act, 1883), s. 74, sub-s. 6, "If a trustee at any time retains for more than ten days a sum exceeding 50*l.*, or such other amount as the Board of Trade in any particular case authorize him to retain, then, unless he explains the retention to the satisfaction of the Board of Trade, he shall pay interest on the amount so retained in excess at the rate of twenty pounds per centum per annum, and shall have no claim for remuneration, and may be removed from his office by the Board of Trade, and shall be liable to pay any expenses occasioned by reason of his default."

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their liability, and the Board of Trade issued a writ for the 100*l.*, upon which this special case was stated by consent, the question for the opinion of the Court being whether the corporation were liable under the bond and the memorandum of agreement to pay to the Board of Trade the said sum of 100*l.* or any part thereof. Phillimore J. held that the corporation were liable. (1) The defendant corporation appealed.

Bankes, K.C., and *Frank Mellor*, for the appellants. The appellants are not liable to pay the penal interest to the Board of Trade merely because the trustee failed to pay it when called upon. Such a liability was not in the contemplation of the parties at the time the fidelity bond was executed. When the language of the bond is scrutinized, it is apparent that it only contemplated the execution by the trustee of the duties required of him in his character of trustee, and the obligation to pay penal interest at the rate of 20 per cent. was not one of the duties the performance of which was required of him as trustee. The interest was in the nature of a punishment imposed on the trustee for default in his duties, and the bond only guaranteed the performance by him of his duties and not the payment by him of any fine inflicted upon him as a penalty for default in performance. The bond is given to cover loss or damage to the bankrupt's estate occasioned by default of the trustee in the performance of his duties; the penal interest is not loss or damage to the estate; it is rather in the nature of an accretion, or an unexpected windfall, the payment of which was not guaranteed by the bond; it is in the nature of a penalty and not of unliquidated damages, and cannot be the measure of the damage to the estate.

Hansell, for the Board of Trade. The decision of Phillimore J. was right and should be upheld. The 20 per cent. interest is in

(1) The case raised a further question whether the corporation were entitled to set off against the claim of the Board of Trade remuneration earned by, but not paid to, the trustee, which he had forfeited by reason of his default. Phillimore J. held that the corporation were not so entitled. In the Court of Appeal the point was mentioned in argument, but it became unnecessary to decide it, and no judgment was given upon it.

its nature a statutory assessment of the loss to the estate and of the damages which the trustee has to pay on default in the performance of a particular duty. The bond does more than provide that the estate shall be put into the same condition that it would have been in if the trustee had proved to be immaculate; it is intended to ensure the payment of the damage to the estate as fixed by statute. The 20 per cent. interest, when paid, belongs to the bankrupt's estate—*In re Sims* (1)—and the estate of the bankrupt is, as appears from s. 44 of the Bankruptcy Act, 1883, the property of the bankrupt divisible amongst his creditors. The interest is therefore, when paid, divisible amongst the creditors, and they have lost the amount owing to the default of the trustee in not paying it, and it falls within the language of the guarantee against loss or damage to the estate; it is not a penalty at all.

Bankes, K.C., was not called upon to reply.

June 3. VAUGHAN WILLIAMS L.J. The only question for our decision is whether the interest at the rate of 20 per cent. for which a trustee in bankruptcy may become liable in the event of his retaining a sum exceeding 50*l.* in his hands for more than ten days instead of paying it into the bank is something which is covered by the language of the bond in the present case. That language, as set out in the special case, runs thus: "if the said trustee shall and do from time to time well and sufficiently perform and execute all and singular the duties required of him as trustee by the Bankruptcy Acts 1883 and 1890 or any general rules made or hereafter to be made under such Acts or if the said trustee shall fail therein and the said corporation shall make good any loss or damage occasioned by any such default made after the date hereof to the estate of the said bankrupt including so much of the costs of the removal of the defaulting trustee and the appointment of his successor as shall be in excess of the amount which in the opinion of the Inspector-General in Bankruptcy shall represent the value of the work done by the defaulting trustee for which he shall not have

(1) [1907] 2 K. B. 36.

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received remuneration to the extent of 500*l.* this obligation shall be void or otherwise shall remain in full force and virtue." Under those words the extent of the liability of the defendant corporation is to make good "any loss or damage occasioned by any such default made after the date hereof," and "such default" is a default in well and sufficiently performing and executing the duties required of him as trustee by the Bankruptcy Acts, 1883 and 1890, or the general rules made under them. In my opinion the liability of a trustee to be in a certain event charged with 20 per cent. interest, which is imposed by s. 74, sub-s. 6, of the Bankruptcy Act, 1883, is a liability to the payment of a penal sum, and is not covered by the language of the bond which I have just read. In the present case my opinion is that the trustee cannot, by reason of his not having paid the penalty of 20 per cent. interest, be said within the language used in this bond to have failed to perform any of the duties required of him as trustee. He did in fact fail to perform those duties, and retained a sum exceeding 50*l.* in his hands for a longer period than allowed by law, but he eventually paid that sum into the bank to the proper account; he has not paid the penal interest, but it was not one of his duties "as a trustee" to do so, and he did not fail in his duty as a trustee when he failed to pay it. There is no other question with which it is necessary to deal.

FLETCHER MOULTON L.J. I have come to the same conclusion. The rights of the Board of Trade are based upon this fidelity bond, which was given in order to secure them against possible loss arising from their employing the person giving the bond as the trustee of an estate in bankruptcy. In its nature the bond is intended to secure that, in the event of the trustee failing to carry out his duties properly, the estate shall be put in the same position (to the extent of 500*l.*) as though the trustee employed had turned out to be immaculate. If we look at the actual language of the bond, it says that "the said corporation shall make good any loss or damage occasioned by any such default made after the date hereof to the estate of the said bankrupt," and "any such default" is a default in performing

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and executing "all and singular the duties required of him as trustee by the Bankruptcy Acts, 1883 and 1890." Therefore the bond binds the defendants to make good to the bankrupt's estate the loss so arising. The Board of Trade in this action claim only one item of loss; they say that the trustee has not paid interest at the rate of 20 per cent. per annum on the amount improperly retained by him. The amount improperly retained by the trustee has been repaid by him to the estate, and the only claim of the Board of Trade is in respect of the 20 per cent. interest on that amount. In order to recover this sum the Board of Trade must establish that it is the measure of the loss to the estate from the default of the trustee. It is evident that it is not so in fact, because the estate would not have received any such sum had the trustee been faultless. But they contend that s. 74, sub-s. 6, of the Bankruptcy Act, 1883, fixes that penal interest as the loss to the estate. [His Lordship read the sub-section.] I have no hesitation in holding that these provisions do not statutably fix the loss to the estate at this 20 per cent. per annum interest. It is in the nature of a penalty for the trustee's default. If this provision were found in a contract entered into between two contracting parties, no one could possibly argue that this sum was in the nature of liquidated damages as contrasted with a penalty; the amount of interest being so high and the rule being so rigid prove this incontestably, and this view is further supported by the fact that, if a satisfactory excuse such as inadvertence can be produced to the Board of Trade, the sum entirely ceases to be payable. The sum payable under the statute is therefore a penalty and not liquidated damages. It follows therefore that in my opinion Phillimore J. was wrong in treating the penal interest as a statutory measure of damages binding on the parties to this bond. I agree with him that the damages for retaining money in a trustee's hands may be substantial, but this is insufficient to shew that the provision can properly be regarded as shewing the intention of the Legislature to take this penal interest as the true measure of damages. As soon as the conclusion is arrived at that this sum is in the nature of a penalty, it is clear that the position of the Board of Trade is unsustainable. The defendants have only undertaken

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to make good the loss to the estate, and it is admitted that, if the 20 per cent. is not the statutable measure of the loss, we must go to the facts to measure it, and the Board of Trade cannot succeed upon the special case as drawn. I hold, therefore, that judgment must be entered for the defendants.

BUCKLEY L.J. I agree. The Board of Trade claim to be indemnified by the defendants up to the limit of 100*l.* in consequence of the non-payment by the trustee of interest at the rate of 20 per cent. per annum upon a sum of money improperly retained for some years by him. The right to charge the interest arose under s. 74, sub-s. 6, of the Bankruptcy Act, 1883. The claim against the present defendants arises under a bond which provides that if the trustee makes default in the performance of the duties required of him as trustee by the Bankruptcy Acts, 1883 and 1890, the defendants will make good any loss or damage to the estate occasioned by such default. It is said by the Board of Trade that the 20 per cent. per annum interest on the amount improperly retained is the measure of the loss or damage occasioned to the estate. If that contention is wrong, it is admitted that upon this special case the Board of Trade cannot recover anything. The whole question therefore is whether, upon the language of this particular bond, the defendants have undertaken to indemnify the Board of Trade against the non-payment of this interest.

In my opinion the loss or damage to the estate of the bankrupt means the difference between the amount of the estate if there had been no default and the amount having regard to the default. The 20 per cent. interest is no measure of that difference ; it is not a loss occasioned to the estate by the default at all. To the extent that it exceeds the ordinary rate of interest it is an accretion, a gain to the estate. It is said that the statute has fixed this 20 per cent. interest as being a statutory assessment of the damage ; I do not think that the contention can be supported. The loss to the estate might be more or less than the 20 per cent. interest ; it is not by any means necessarily the 20 per cent. If the trustee retained a sum of money, but gave an explanation that was accepted, he

would not be liable to the 20 per cent. interest, and so far as the statute is concerned he would not be liable to pay anything, although there might well have been a loss to the estate. The statute imposes upon the trustee a liability to pay a certain sum in a certain event, and not a liability to pay the loss which may have accrued to the estate; the loss to the estate is not measured by the 20 per cent. interest, and the 20 per cent. is not the loss occasioned by the default. There is a second contention by the Board of Trade, namely, that, when the trustee failed to pay over the sum of money in his hands and was ordered to pay the 20 per cent. interest, his failure to pay that interest was a default by him in the performance of his duties as a trustee. But this is a fallacy. When the trustee had failed in his duty to pay over the money in his hands his liability to pay the 20 per cent. interest was not a liability as trustee, the satisfaction of which was part of his duty as a trustee, and upon whose payment every duty he owed as a trustee would have been discharged. It was a penalty imposed upon him for being an improper trustee; the liability did not arise in the performance of his duty; it arose from its non-performance.

As to the trustee's remuneration, if it is a correct proposition that the loss to the estate is the difference between the amount of the estate where there has been default and where there has been none, it might appear that the trustee's remuneration ought to be brought into account, as a matter of adjustment. I am inclined at present to be of the contrary opinion, but I do not decide it. I give no reasons for the view which at present I entertain, for the question does not arise. The plaintiffs, not being entitled to the 20 per cent., are entitled to nothing; it is unnecessary to consider whether a deduction can be made from nothing.

VAUGHAN WILLIAMS L.J. I intended in my judgment to refer to *Beresford* v. *Birch* (1), in which Abbott C.J. said, speaking of the 20 per cent. interest in a similar clause in 49 Geo. 3, c. 121, s. 4, "But this interest at 20 per cent. is in the nature of

(1) (1824) 1 C. & P. 373.

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a penalty, and I think you must declare specially as for a penalty."

Appeal allowed.

Solicitor for plaintiffs : *Solicitor to the Board of Trade.*
Solicitors for defendants : *Watson, Sons & Room.*

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LITTLE *v.* SPREADBURY.

Practice—Authority of Solicitor to compromise Action—Apparent Assent but Misunderstanding in Fact on Part of Client as to Terms of Compromise.

If a client by his conduct induces his solicitor to believe that he is authorized to make a certain compromise in an action which the solicitor is conducting on behalf of the client, and the solicitor, reasonably relying on that conduct and believing that he has the authority of the client, makes the compromise, the client is bound whether he intended to give that authority or not and whether he in fact understood or did not understand the terms of the compromise.

Before a county court action was tried a settlement was arrived at between the solicitors for the respective parties and a memorandum embodying its terms was signed by the solicitors. This memorandum was not read by the defendant, but it was read over to her by her solicitor or his son, and she seemed to assent to its terms. The action was thereupon, by consent of the county court judge and the solicitors on both sides, struck out. Although the defendant seemed to assent to the terms of the compromise she did not in fact understand them and did not mean to assent to them. Subsequently an agreement in writing, signed by the solicitors for both parties, containing the terms of the memorandum was sent to the defendant, who repudiated it upon the ground that the terms of the compromise which she authorized her solicitor to effect were not contained either in the memorandum or in the written agreement:—

Held, that the defendant was bound by the compromise made by her solicitor and was liable in damages for the breach of it.

APPEAL from the judgment of the judge of the Hampshire County Court holden at Winchester.

The plaintiff, Miss Vivia Little, brought the action in the county court to recover the sum of 35*l.* from the defendant, Mrs. Spreadbury, as damages for the alleged breach by the defendant of the terms of a compromise dated December 15, 1909,

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of an action between the same parties. It appeared that in June, 1906, the plaintiff purchased a Pomeranian bitch known as Firefly, which (according to her contention) she placed in the defendant's charge upon the terms that the plaintiff was to pay 1*s.* a week as expenses and the defendant was to have half the proceeds of the sale of any puppies which the bitch might have. The defendant, however, contended that the plaintiff gave her the bitch outright subject to the plaintiff having half the proceeds of the sale of the puppies. In February, 1909, the plaintiff resumed possession of the bitch with the consent of the defendant. The animal was placed elsewhere by the plaintiff, and on December 16, 1909, the defendant went to the place where the bitch then was and took her away. The plaintiff thereupon commenced proceedings in the county court for the recovery of the bitch from the defendant. Before that action was tried a settlement was arrived at between the solicitors for the respective parties and the following memorandum embodying its terms was signed by them:—

"Dog to be handed over to plaintiff, who is to retain same until she has bred and sold puppies to repay her 15*l.* she has already expended and the cost of keep, stud fees, travelling expenses, and veterinary fees to be incurred by her, and her costs of action agreed at 6*l.* 6*s.* and Court fees.

"The dog then to be handed to defendant as her absolute property.

"Dog to be insured for 20*l.* until all above paid, the premium to be paid equally by plaintiff and defendant. Policy money to be applied in payment of any balance due to plaintiff, any surplus to belong to defendant.

"Mr. Tutt" (a veterinary surgeon of Winchester) "to be at liberty on defendant's behalf to inspect dog at all reasonable times with the view of seeing all proper steps are taken as to breeding.

"If dog does not breed within two years the dog to be handed to Mrs. Spreadbury."

This agreement was not read by the defendant, but it was read over to her by her solicitor, Mr. Lamport, or his son, and the action was thereupon, by consent of the county court judge and

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the solicitors for both parties, struck out. Subsequently an agreement in writing, signed by the solicitors for both parties, containing the terms of the memorandum was sent to the defendant, who thereupon repudiated it upon the ground that the compromise that she authorized her solicitor to effect was upon the basis of the bitch becoming her property after two years whether she had had puppies or not. She therefore declined to deliver up the dog to the plaintiff. The present action was thereupon brought by the plaintiff, who claimed (inter alia) damages for the alleged breach by the defendant of the terms of the settlement of the previous action.

The county court judge found that the terms of the settlement of the first action did not accurately represent the terms to which the defendant agreed, but that the terms agreed to by the defendant were that whether the bitch did or did not have puppies within two years she was at the expiration of that period to be returned to the defendant, Mrs. Spreadbury, as her absolute property, and that the defendant's solicitor had authority only to compromise the action on those terms and had no authority to compromise it on any other, and that any other terms were by implication forbidden. He accepted the evidence given by Mr. Lamport, the defendant's solicitor, and his son, to the effect that the terms of the agreement sued upon were read over to her and that she seemed to assent to them, but he found that she did not in fact understand the terms of the settlement and did not mean to assent to them. Upon this ground he gave judgment for the defendant.

The plaintiff appealed.

Francke (*S. H. Emanuel* with him), for the plaintiff. The county court judge was wrong. The defendant's solicitor had authority to agree to the terms of settlement in the absence of express prohibition. The compromise was with regard to the matter in dispute and not with regard to a collateral matter which might be outside the general authority of counsel or solicitor. The present case is covered by the decision in *Strauss* v. *Francis* (1), which was among the authorities cited in the

(1) (1866) L. R. 1 Q. B. 379.

Court of Appeal in *Neale* v. *Gordon-Lennox* (1) and adopted by the Earl of Halsbury L.C. in his judgment in that case in the House of Lords. (2) Where a client apparently consents to a compromise and leads the solicitor to reasonably believe he understands it, the client cannot afterwards say he did not understand it: *Holt* v. *Jesse* (3); *Hickman* v. *Berens* (4); *Fray* v. *Vowles* (5); *Chown* v. *Parrott.* (6) [*Chambers* v. *Mason* (7) and *Rumsey* v. *King* (8) were also referred to.]

H. F. Dickens, K.C., and *Mallinson*, for the defendant. Whether the compromise ought to be held to be binding on the defendant was a matter within the discretion of the county court judge, and he rightly exercised his discretion in holding that the defendant ought not to be bound as there was a misunderstanding on her part: *Lewis's* v. *Lewis.* (9) The decision in *Harvey* v. *Croydon Union Rural Sanitary Authority* (10) is a direct authority in support of the proposition that it is for the judge to decide whether there has been such a mistake that he ought to set the compromise aside. It was pointed out by the Earl of Halsbury L.C. in delivering judgment in *Neale* v. *Gordon-Lennox* (2) that a compromise must be dealt with in the same way whether the party relying upon it is applying for specific performance or is asking the Court for an order enforcing the compromise. That case also shews that it is not necessary that the limitation of authority should be made known to the other side in order to enable a Court to set the compromise aside. In the present case there was not enough to give the defendant's solicitor apparent authority to make the compromise and the position of the parties has not been altered. *Chambers* v. *Mason* (7) and *Prestwich* v. *Poley* (11) are distinguishable. In those cases the matter was left entirely in the advocates' hands. *Strauss* v. *Francis* (12) is inconsistent with *Neale* v. *Gordon-Lennox* (2) and must therefore be taken to have been overruled. In the present case the solicitor had no authority in fact to do

(1) [1902] 1 K. B. 838.
(2) [1902] A. C. 465.
(3) (1876) 3 Ch. D. 177.
(4) [1895] 2 Ch. 638.
(5) (1859) 28 L. J. (Q.B.) 232.
(6) (1863) 32 L. J. (C.P.) 197.
(7) (1858) 28 L. J. (C.P.) 10.
(8) (1876) 33 L. T. 728.
(9) (1890) 45 Ch. D. 281.
(10) (1884) 26 Ch. D. 249.
(11) (1865) 18 C. B. (N.S.) 806.
(12) L. R. 1 Q. B. 379.

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what he did. He therefore acted beyond his authority, and the fact that the limitation of authority was not mentioned to the other side is immaterial.

Francke, in reply, referred to *In re Newen*. (1)

BRAY J. In this case the plaintiff contends that there was a binding contract between her and the defendant in the terms of the document signed by the two solicitors. The answer of the defendant to that contention is, "My solicitor signed that without authority." Before I deal further with those contentions I wish to distinguish the decision of the House of Lords in *Neale* v. *Gordon-Lennox* (2), which in my opinion has no real bearing upon the point that we have to decide. In that case the facts were in substance that there was a trial, that the plaintiff signed a certain document agreeing that the case should be referred to arbitration, one of the terms of which was that there should be a withdrawal of all imputations in Court, and that afterwards her counsel made an agreement in which there was no such term. The plaintiff then desired to get that agreement set aside, and before any order was drawn up took steps with a view to that being done. The order was then drawn up in order that it might be set aside. That was mere form. The real question which the Court had to determine was whether it would order that the case should be referred to arbitration. The Court was therefore being asked (as the Earl of Halsbury L.C. pointed out in his judgment) for its assistance. In delivering judgment the Earl of Halsbury L.C. said: "The Court is asked for its assistance—and I entirely repudiate the technical distinction between what is called an application for specific performance and an order to be made that such and such things should be done—the Court is asked for its assistance when this order is asked to be made and enforced that the trial of the cause should not go on." Later in his judgment he said: "Where the contract is something which the parties are themselves by law competent to agree to, and where the contract has been made, I have nothing to say to the policy of law which prevents that contract

(1) [1903] 1 Ch. 812. (2) [1902] A. C. 465.

being undone: the contract is by law final and conclusive. But when two parties seek as part of their arrangement the intervention of a Court of justice to say that something shall or shall not be done, although one of the parties to it is clearly not consenting to it, but has in the most distinct form said that the consent to refer—to take it from the jurisdiction of the ordinary tribunal—shall only be on certain terms, to say that any learned counsel can so far contradict what his client has said, and act without the authority of his client as to bind the Court itself, is a proposition which I certainly will never assent to." It seems to me to be quite clear that the ground upon which the Lord Chancellor based his judgment in that case was that the party seeking to uphold the arrangement was coming to the Court to ask it to enforce by an order a certain thing being done and that he excepts altogether the case of a contract which can be carried out by the parties without the intervention of the Court for the purpose of saying that something shall or shall not be done. That is, in my opinion, why he did not deal with a great number of cases which had been cited. In my opinion that case is quite distinguishable.

In the present case we have only to consider the question which ordinarily arises upon any contract that is signed by an agent, namely, whether that agent had authority to bind the principal. In my judgment the authorities shew that in the absence of a special prohibition a solicitor has power to make a compromise with regard to the subject-matter of the action, but not with regard to collateral matters. It is not contended that this compromise deals with any collateral matter. The dispute between the parties with regard to which the first action was brought was as to who was to have possession of the dog, and the parties very sensibly arranged that as the dog could not be divided between them one party should have possession of it for a certain time and that the other party should have possession of it afterwards, and that meanwhile the dog should be insured and the person who did not first have it should have inspection of it from time to time. Those seem to me matters as to which the solicitor was competent to make a compromise, unless he had an express prohibition from his client not to enter into such

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Bray J.

compromise. On behalf of the plaintiff it has been contended that in law it matters not whether there was such express prohibition or not if the other side was unaware of the prohibition. It seems to me to be unnecessary to decide that point. I will assume for the purpose of my judgment, without deciding the point, that if there was an express prohibition on the part of the defendant to enter into the contract she would not be bound.

The county court judge has found that when the terms of compromise were read over to her the defendant seemed to assent (in other words he accepted what Mr. Lamport, the solicitor who was then acting for her, and his son said upon that point), but that nevertheless she did not in fact understand them and she did not mean to accept them.

The defendant contends that before the terms were read to her she had told Mr. Lamport to agree to certain terms and that therefore a prohibition against compromising upon any other terms is implied. I will assume in the defendant's favour that in the first place she said to her solicitor "These are the terms that I will accept," the terms not being those of the compromise; and that, as often happens, the other side were not willing to accept those terms, but asked for some modification of them, and that the memorandum which was drawn up was a modification of them. That memorandum was read to her. She seemed to consent to it. In my opinion that bound her and gave authority to the solicitor to enter into that contract. In my judgment, if a client by her conduct induces her solicitor to believe that he has authority to make a certain compromise, and he, reasonably relying on that conduct and believing that he has that authority, does make that compromise, the client is bound whether she intended to give that authority or not and whether she in fact understood or did not understand the terms of the compromise. That is an application of the common law principle that a person is bound by his acts. You cannot go into what his intentions were. The defendant is bound by her acts, and if she led her solicitor to believe that she assented to those terms, it was, in law, an assent to his making those terms. It seems to me unnecessary to decide anything further. In my opinion Mr. Lamport, the defendant's solicitor, had authority to enter into the agreement when he did

so. There was no withdrawal of authority before that agreement was signed or before the action was struck out. How soon afterwards the authority was withdrawn it matters not; that agreement was signed while the solicitor was under the belief that he had authority to do so. In my judgment the defendant was bound, and it is our duty to say that the county court judge should hold as a matter of law upon his findings that she was bound, by the contract, and inasmuch as she has broken the contract he must try the question of what damages the plaintiff has suffered in such manner as he thinks right.

LORD COLERIDGE J. I agree. I need not recapitulate the facts which have been so lucidly stated by Bray J. My view of the law is this: Where a client has given specific instructions for a compromise, or has given a prohibition against compromising, except upon certain terms, the solicitor has no authority from the client to depart from those instructions without the client's consent expressed or implied. Where, however, there is a general authority, a solicitor has authority to compromise on such terms as he thinks best for his client. It is unnecessary to decide whether the client has in such a case a right to repudiate such authority. The client can certainly only do so on the ground of mistake or surprise and at the earliest possible moment—at any rate before an order is drawn up; and if in the meantime the other side has acted on the compromise in such a manner that it would be inequitable to annul it, I think the client would nevertheless, notwithstanding the withdrawal, be bound. But that is not the case with which we are dealing, nor is this a case where the solicitor has effected a compromise through his own admitted inadvertence or mistake to which the client has not in fact consented. In this case the client—although not in fact understanding the terms of the compromise, and therefore not in fact assenting to it—nevertheless apparently assented to it. By her conduct she led the solicitor reasonably to believe that she did consent to it, and the solicitor, relying upon such apparent consent, effected the compromise. In these circumstances the compromise is, in my judgment, binding on the client whether the authority to compromise be general or specific, or even where

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Lord Coleridge J.

there was originally a prohibition to compromise upon the terms which the client subsequently apparently assented to, although in the latter case the evidence would have to be stronger in order to prove the apparent consent. In the present case, however, the county court judge has found that the defendant did, by conduct, induce her solicitor to believe he had authority to effect the compromise in question. He accordingly acted upon his apparent authority, and the defendant is therefore bound by his act.

Appeal allowed.

Solicitors for plaintiff: *Church, Adams & Prior, for Percy W. Snelling, Winchester.*

Solicitors for defendant: *Nonweiler & Romain.*

J. E. A.

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July 6.

[IN THE COURT OF APPEAL.]

KING *v.* PHŒNIX ASSURANCE COMPANY.

Employer and Workman—Compensation—Company—Winding-up—Insurance—Liability of Insurers—Arbitration Clause in Policy—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 5, *sub-s.* 1.

In the case of bankruptcy or winding up of an employer who is insured s. 5 of the Workmen's Compensation Act, 1906, only gives the workman the same right against the insurers as the employer would have had. Where a policy of insurance contains a clause that any dispute between the insured and the insurers shall be referred to arbitration under the Arbitration Act, and that an award under that Act shall be a condition precedent to any right of action against the assured, and there is a bona fide dispute, a workman cannot take proceedings in the county court to have compensation awarded until the matter has been referred to arbitration under the Arbitration Act and an award obtained.

LOUISA KING, the plaintiff in this case, was an infant employed by the British Roller Skating and Engineering Company. On February 7, 1910, the punch of a press at which she was working fell upon both her hands and cut off several fingers. The company paid full compensation from February 7 to March 14. On

March 18 they went into liquidation and ceased to pay compensation. The company were insured against accidents under the Workmen's Compensation Act in the Phœnix Assurance Company. On March 23 the plaintiff applied to the county court for an order that the company should continue the payment of compensation from March 14. This application was made under s. 5, sub-s. 1, of the Act of 1906. (1)

The insurance company objected that the county court judge had no jurisdiction to hear the case because there was a dispute between the company and the employer as to the company's liability, and the policy of assurance contained an arbitration clause in the following terms:— "(8.) If any difference or dispute of any kind whatsoever shall arise between the insured and the company in respect of this policy or in respect of any claim or of any matter or thing or liability arising or alleged to have arisen hereunder or otherwise connected herewith, the same shall be referred to arbitration in accordance with the provisions of the Arbitration Act, 1889, or any Act amending the same. The due observance and fulfilment of the provisions and conditions of this policy shall be a condition precedent to any liability of the company under this policy and an award given in favour of the insured in such an arbitration shall be a condition precedent to any right of action against the company in respect of such difference or

(1) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58):

"5.—(1.) Where any employer has entered into a contract with any insurers in respect of any liability under this Act to any workman, then, in the event of the employer becoming bankrupt, or making a composition or arrangement with his creditors, or if the employer is a company in the event of the company having commenced to be wound up, the rights of the employer against the insurers as respects that liability shall, notwithstanding anything in the enactments relating to bankruptcy and the winding up of companies, be transferred to and vest in the workman, and upon any such transfer the insurers shall have the same rights and remedies and be subject to the same liabilities as if they were the employer, so however that the insurers shall not be under any greater liability to the workman than they would have been under to the employer.

"(2.) If the liability of the insurers to the workman is less than the liability of the employer to the workman, the workman may prove for the balance in the bankruptcy or liquidation."

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dispute." Clause 4 of the policy provided, "The insured shall take all reasonable precautions to prevent accidents and to comply with all statutory obligations."

The county court judge overruled this preliminary objection for the purpose of ascertaining the facts. The evidence shewed that an efficient guard had been provided by the employers, but it was not in use at the time of the accident owing to the carelessness of the foreman, for which both he and the employers had been summoned and fined at the police court. The insurance company had in correspondence repudiated their liability on the ground that the employers had not taken proper precautions as required by clause 4. After hearing this evidence, the county court judge decided that the correspondence disclosed a dispute between the parties to the policy, and that therefore the submission to arbitration of the question of liability was a condition precedent to an arbitration before him under the Workmen's Compensation Act. He therefore made an order staying proceedings for such time as would enable the applicant to have the question of liability determined as between her and the respondents in manner provided by the policy.

The plaintiff appealed.

E. W. Cave, for the appellant. Sect. 5, sub-s. 1, of the Workmen's Compensation Act, 1906, transfers the liability of the employer to the insurers. It is true that it provides that they are not to be under any greater liability to the workman than they were under to the employer, but it is clear from s. 5, sub-s. 2, that those words only refer to the pecuniary amount, for the workman is allowed to prove for the balance. Sched. II. (2.) makes the county court judge the sole arbitrator under the Act, and (4.) specially provides that the Arbitration Act, 1889, shall not apply to any arbitration under this Act. The Rules of 1907 make the case clearer, for r. 8 shews that every application for arbitration must be to the county court, and r. 35 (3.) says "that the provisions of the Act and these Rules as to the settlement of matters by arbitration shall with the necessary modifications apply to the settlement by arbitration of

any question as to the liability of the insurers." The whole scheme of the Act and Rules is to give the workman a cheap and simple remedy in case of accidents. That object is wholly defeated if the workman has to go through an expensive arbitration under the Arbitration Act, 1889, as a condition precedent to proceedings before the county court. The insurers are not under the same liability as the employer if they are not liable to proceedings before the county court. All that the policy amounts to is an agreement to refer all disputes between the insurers and the employers; it cannot apply to a dispute between the insurers and the workman; all such disputes must be decided under this Act.

Even if the applicant is wrong on that point, the question of jurisdiction was not raised by the insurance company's answer as it should have been under r. 17 and is not open to the company.

W. Shakespeare, for the respondents, was not called upon.

COZENS-HARDY M.R. This is, so far as I am aware, the first case which has come before this Court under s. 5 of the Act of 1906. It raises a point which is certainly of importance; but I cannot say that it is, to my mind, a point of difficulty. It is a case in which the applicant, a girl, was employed by a company. She met with a very sad accident. The company did not dispute their liability to her. They paid compensation until proceedings were taken against them, or by them—I do not know which—with a view to a winding-up. Then the girl took proceedings under s. 5 against the Phœnix Assurance Company, with whom the employers had effected a policy.

Sect. 5, sub-s. 1, says this: [His Lordship read the section set out above.]

I will read sub-s. 2 also: "If the liability of the insurers to the workman is less than the liability of the employer to the workman, the workman may prove for the balance in the bankruptcy or liquidation."

I am quite unable to read that section as having any other operation or effect than this—that it, by way of subrogation, enables the workman to stand in the shoes of the employer with reference to the insurance company. It is a little

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more than that, because it prevents any claim on behalf of the general creditors, and is therefore a subrogation protected against the claims of creditors or other persons under the bankruptcy or winding-up. But unless the employer was in a position to make a claim under the policy against the insurance company, I find no word in that section which lends any countenance to the suggestion that the workman can be in any better or different position. The only thing that is transferred is this, that "the rights of the employer against the insurers as respects that liability shall be transferred to and vest in the workman"; but it goes on to say that "the insurers shall not be under any greater liability to the workman than they would have been under to the employer." "Greater" cannot mean merely more pounds, shillings, and pence. It is a "greater liability" imposed upon an insurance company if they are liable to pay in a different event, or more speedily than they would under the contract between them and the employers themselves. Therefore if at the moment when this application was made there was no right on the part of the employers against the insurance company, I fail to see how any remedy whatever can be given to the workman against the insurance company.

Then it is said, "Every dispute under this Act is to be referred to arbitration," and, moreover, the Second Schedule to the Act says "The Arbitration Act, 1889, shall not apply to any arbitration under this Act," and by r. 35 of the General Rules under the Workmen's Compensation Act "the provisions of this Act and these Rules as to the settlement of matters by arbitration shall, with the necessary modifications, apply to the settlement by arbitration of any question as to the liability of the insurers or the amount of their liability."

That cannot, as it seems to me, in defiance of the plain language of s. 5, change the liability of the insurance company under the policy. When I look at the policy I see that there is a clause in perfectly plain terms, the effect of which, as was admitted by Mr. Cave in his very able argument, is that at the present moment the employer could make no claim against the insurance company under the policy, because there is a condition precedent to any claim that there shall have been a submission

to arbitration, and a determination of the dispute by arbitration. In fact, under the policy, if there is a dispute, the liability of the Phœnix Company is to pay not upon a quantum meruit, not upon what a judge or a jury may think, but upon what, by the terms of this contract, an arbitrator shall award to be paid.

That was the view taken by the learned county court judge, who has given a very careful judgment in this case. I entirely agree with the views which he has expressed, and I think that we should be departing altogether from the true meaning of s. 5 of the Act if we said that the workman was in any larger, better, or different position than the employer would be, vis-à-vis of the insurance company.

Then it is said that this is hard upon the workman. The answer to that is that the workman only gets the benefit of s. 5 upon the terms of s. 5. The workman has no contract with the insurance company. The workman has a right, under the statute, in the earlier part, against his own employer. This is merely a supplementary special provision in the event of the insolvency or winding-up of the employer. It does not lie in the workman's mouth to say "I have my remedy against my employer, but he is in difficulties, and it is very hard that I should not have a remedy against the insurance company also" and so make the insurance company liable in an event in which they would not be liable otherwise. A person who takes the benefit of s. 5 must take it with its limitations. One of them is that which I have indicated—that he can only claim to be placed in the same position precisely as, and not in any way different from, that which would exist between the employer and the insurance company.

The appeal must be dismissed.

FARWELL L.J. I am of the same opinion. Notwithstanding Mr. Cave's ingenious argument, the case seems to me to be really plain. If I desired to find an explanation of the meaning of the word "subrogation" I do not think that I could do better than read the words in s. 5. The first question to ask is, "What rights has the employer against the insurers as respects the liability?" Those rights and those only are

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transferred to and vested in the workman. The answer is found in the policy. He has no right at all at present, no cause of action of any sort. There is a dispute. The learned judge heard evidence to satisfy himself that there was a bona fide dispute. In that case it is provided that "an award given in favour of the insured in such an arbitration shall be the condition precedent to any right of action against the company in respect of such difference or dispute." There is, therefore, nothing due under the policy at all. There is the right to go to arbitration and ascertain whether anything will become payable. There is a condition precedent that there shall be an award before any payment can be claimed to be due.

It is said that this is hard, and that it nullifies s. 5. As to the hardship, the Master of the Rolls has already answered that. Respectable insurance companies are not, both on grounds of honesty and self-interest, in the habit of disputing, or in the least likely to dispute, honest claims. If there is no dispute the section applies, and there is no difficulty. It is only in case of dispute that the question of arbitration arises at all under the policy, and in such cases the insurance company cannot be deprived of the right which they have contracted for in order to create a larger right to vest in the workman than the employer has bargained to have himself and the insurance company have contracted to give him.

In my opinion the case is really quite plain, and I think that the learned judge was right.

KENNEDY L.J. I agree, and I have nothing to add to the reasons which have been given, with which I entirely concur.

Appeal dismissed.

Solicitors: *Judge & Priestley, for Philip Baker & Co., Birmingham; Buchanan & Hurd, for Shakespeare & Co., Birmingham.*

J. R. B.

[IN THE COURT OF APPEAL.]

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1910
July 11.

BAKER *v.* JEWELL.

Employer and Workman—Compensation—Review of Weekly Payments—Prospective Order—Award terminating Payments at a future Date—Jurisdiction of Arbitrator—Onus of Proof—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched I.* (16.).

On an application to review weekly payments under the Workmen's Compensation Act, 1906, an arbitrator has no jurisdiction to make a prospective award terminating the payments at a given date. An arbitrator has only jurisdiction to award payments during the incapacity of the workman, and his duty is to ascertain what is the workman's earning capacity at the date of the application and to award accordingly, leaving it to the employer to apply for a reduction in the event of the workman's recovery. A prospective award is also wrong inasmuch as it shifts the onus of proof from the employer to the workman in a way that may be unfair to the workman.

Allan v. *Thomas Spowart & Co., Ld.*, (1906) 43 Sc. L. R. 599, approved.

Appeal against an award of the judge of the county court of Shoreditch sitting as arbitrator under the Workmen's Compensation Act, 1906.

In April, 1908, the applicant, a carman in the employment of the respondents, carmen and contractors, was thrown off a van he was driving and sustained an injury to his foot and left leg. Compensation was paid to him by the respondents till the end of 1909, when proceedings under the Workmen's Compensation Act were taken, and by an order of February 15, 1910, compensation at 12*s.* a week was awarded him from the first week in January till March 25, and a penny a week after that date. In May following the applicant, being as he alleged still incapacitated, applied to review the award. On June 9, acting on the report of a medical referee that the applicant would be able to do his work in some three months' time, the county court judge made an award for 8*s.* a week from March 25 to July 25, 1910, and a penny a week after that date. The applicant appealed. The appeal was heard on July 11.

Firminger and *W. A. N. Battenburgh*, for the appellant. The arbitrator has no jurisdiction to make a prospective award

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stating when the compensation is to cease. On an application to review the weekly payments the arbitrator can only assess the compensation payable having regard to the workman's condition as proved by the evidence then adduced, and he must not speculate as to his future capabilities or condition. A similar point was decided under the Act of 1897 in Scotland: *Allan* v. *Thomas Spowart & Co., Ld.* (1)

A prospective award of this kind is also wrong because it shifts the onus of proof from the employer to the workman, and may work a great hardship for that reason.

[They were stopped.]

C. A. Russell, K.C., and *A. F. Schuster*, for the respondents. No objection was taken to the order of February 15, which is in the same form, and no argument was addressed to the county court judge against the present award being made in this form; the county court judge's attention was not called to this point. The man has been receiving compensation for two years, and the respondents think he could work if he liked; the medical referee was clearly of opinion that the man would be quite right in three months.

[FARWELL L.J. The jurisdiction to review is only during incapacity, and usually the employer has to prove that the incapacity has ceased.]

The matter must go back to be reconsidered as a whole if the award is not to stand in its present form.

Firminger, in reply, asked that the award might stand for 8*s.* a week until reviewed or varied.

COZENS-HARDY M.R. This is, in my view, an important point. I am not sure whether it has ever arisen for decision in this country, although it has in Scotland. It really is this—whether it is competent for a county court judge acting as arbitrator under the Workmen's Compensation Act to make a prospective award, and say "I award so much for the next ten weeks, and then I award a penny a week" or whatever it may be.

In my opinion it is not competent for an arbitrator to make such an award. It has two defects, and it has two results. One

(1) 43 Sc. L. R. 599.

is that the arbitrator is taking upon himself the function of a prophet, which is not what he ought to do; and the next is this, which to my mind is a more serious matter: it shifts the onus of proof in a mode which is, or which may be, very unfair to the workman. The duty of the arbitrator is to say what, upon the evidence adduced before him at the time of the hearing for a review, is the condition of the workman, and on that footing he ought to make an award of so much per week during the incapacity. Then, if there is a change, if the man is getting better, it is for the employer to seek to review the weekly payments on the ground that the incapacity has ceased or determined, or whatever the cause may be. The burden is thus thrown upon the employer to shew that there is a change of circumstances. If, however, the award is made in the manner in which it is made here, namely, so much a week for a certain time, and then only a penny a week, and if the man's condition should, at the end of the first period, be substantially the same as before, the burden is thrown upon the workman, and not upon the employer, and the workman would in that case have to get the award reviewed. On general principles, and on authority, which, although not strictly an authority binding upon us, is an authority to which I am glad to refer, I have no doubt that an award such as is made here is not within the competence of the arbitrator.

The precise point arose in Scotland in the year 1906, in *Allan* v. *Thomas Spowart & Co., Ld.* (1), where the sheriff-substitute had ended the compensation as from March 31, the date of the judgment being February 27. He allowed the compensation for a month, and then it ended. The Lord President said: "The sheriff-substitute has to a certain extent pronounced judgment beforehand on a future event. The function of the sheriff in assessing compensation is to have regard to the man's present state, and he is not entitled to pronounce judgment beforehand, the validity of which depends on his condition at a future date." That seems to me to be both good sense and good law, and I think it ought to be followed in this country.

(1) 43 Sc. L. R. 599.

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The appeal therefore succeeds, and the appellant must have the costs of the appeal. The case must go back to the learned county court judge to make a new award, the respondents (the employers) undertaking without prejudice to any question to continue the payment of 8*s*. a week up to July 26.

FARWELL L.J. I am of the same opinion. It is satisfactory to find that we are able to follow the decision of the Scottish Court, because it is certainly desirable that on this Act the decisions of the two countries should be the same. I am under the impression that we have already decided this point; but in any case I am of opinion that there is no power to make such an award as this. The only power to make an award is given by the Act, and it is during the incapacity. It is a weekly payment during the incapacity. There is no power to award for a term determinable by what the county court judge thinks he can find, on the evidence, is the period at which incapacity will come to an end.

This gives the workman the advantage of casting upon the employer, in the first instance, the burden of proof of shewing that there should be some ending or diminution. If there has been already a variation by reducing the sum to a penny a week, and the workman desires to increase it, the burden would be on the workman. With regard to the first award the burden is cast upon the employer if he desires to end or terminate it. It certainly, in my opinion, would be wrong to say that this burden can be got rid of by this form of award. It is a question of jurisdiction, and the arbitrator, who has only power to award a weekly payment during incapacity, cannot take it upon himself to say when the incapacity will cease, a matter as to which he can have no certain knowledge. The power to review, which Mr. Russell relies upon, is to review the amount so awarded under the particular original jurisdiction under Sched. I. (16.), and, of course, is simply a corollary to the original power of awarding.

On all these grounds I think that the decision of the learned county court judge, whose attention does not appear to have been specifically called to this point, cannot be supported.

KENNEDY L.J. I agree. I think that it is clear, when you see what the terms and provisions of the Act are, that the county court judge in this case has exceeded his jurisdiction.

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Appeal allowed.

Solicitors : *Charles H. Downes ; Mackrell, Maton, Godlee & Quincey.*

W. C. D.

[IN THE COURT OF APPEAL.]

C. A. 1910 *July* 12.

EKE *v.* HART-DYKE.

Employer and Workman—Compensation—Injury by Accident—Disease—Sewer Gas—Ptomaine Poisoning—Notice of Accident—Prejudice to Employer—Reasonable Cause—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1; *s.* 2, *sub-s.* 1 (*a*); *s.* 8.

An objection that an employer has been prejudiced in his defence to a claim for compensation under the Workmen's Compensation Act, 1906, by the want, defect, or inaccuracy of a notice under s. 2, sub-s. 1, may be satisfied by shewing that such want, defect, or inaccuracy has been occasioned by a "reasonable cause" under the later part of proviso (*a*), which is independent of the earlier part.

Except in the case of the industrial diseases provided for by s. 8, unless the applicant can indicate the time, day, circumstance, and place in which the accident occurred which occasioned the disease, by means of some definite event, a case of "injury by accident" within the meaning of s. 1, sub-s. 1, of the Act cannot be established.

Brintons, Limited v. *Turvey*, [1905] A. C. 230, and *Broderick* v. *London County Council*, [1908] 2 K. B. 807, explained.

APPEAL against the award of the judge of the county court of Bromley sitting as arbitrator under the Workmen's Compensation Act, 1906.

The questions raised by this appeal were (1.) whether the notice of the alleged accident had been given to the respondent in accordance with the requirements of s. 2 of the Act of 1906, and (2.) whether the workman's death was caused by accident or disease. The facts were shortly as follows.

The applicant was the widow of one Eke, who had been employed by the respondent at East Hall, Orpington, Kent, as

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gardener, labourer, and caretaker for some two years prior to the alleged accident, while the house was unoccupied.

In July, 1909, the East Hall was let and it was being painted for the incoming tenant, and Eke was ordered to find and open out certain cesspools for inspection, and he was employed some four or five days on this job. Early in August Eke complained of being unwell, but no doctor was consulted till August 23, when it was supposed that the man was suffering from the smell of paint. In September another doctor attended Eke, and he came to the conclusion that the man was suffering from poisoning by sewer gas. On October 30, Eke died, and his death was stated to have been caused by ptomaine poisoning, from sewer gas being inhaled or absorbed into his system. On December 13, notice of claim for compensation was made against the respondent by a letter of that date, the application for arbitration when served stating that "On or about the —— day of August, 1909," personal injury by accident was caused to the deceased, and the particulars No. 4. being "—— August, 1909 Opening drains and inspection chambers at East Hall . . . . Ptomaine poisoning caused by escape of sewer gas, the said gas being inhaled or absorbed into the system of the deceased from which the deceased became ill and died on 30 October, 1909." Proceedings for compensation having been taken, the county court judge came to the conclusion that the deceased died from the results of poisoning contracted while working on the cesspools, and he made an award in favour of the applicant. The respondent appealed. The appeal was heard on July 12.

It was admitted that the deceased was suffering from an obscure disease and that there was no evidence to shew the exact date at which he had contracted it. It was also admitted that the opening of these cesspools was part of his employment. The county court judge also held that the respondent was not prejudiced in his defence by the want of earlier notice.

Eldon Bankes, K.C., and *Ellis Hill*, for the appellant. No notice of any claim was given till December 13, though the workman died on October 30; notice of the accident therefore

was not given "as soon as practicable after the happening thereof" as required by s. 2, sub-s. 1. Even the application for arbitration gives no date when the accident occurred. It is admitted that this man died of an obscure disease which might have been caused by the smell of paint, in which case the accident would not have arisen "out of and in the course of the employment," and had notice been given at once there could have been a post-mortem examination which would have settled conclusively the cause of death. The employer was therefore prejudiced in his defence by the want of notice. Under proviso (*a*) of sub-s. 1 the onus lies on the workman of shewing that his employer has not been prejudiced in his defence by the want, defect, or inaccuracy of the notice: *Hughes* v. *Coed Talon Colliery Co., Ld.* (1); *Hancock* v. *British Westinghouse Electric Co.* (2)

This was not a case of "injury by accident" within the meaning of the Workmen's Compensation Act, 1906, s. 1, sub-s. 1; to bring the case within the Act there must be injury by an accident of which notice can be given, and here it was not possible to indicate a time, place, or date: *Steel* v. *Cammell, Laird & Co., Ld.* (3); *Broderick* v. *London County Council.* (4) Here the particulars give no exact date and the county court judge finds that it was impossible to fix any particular day or time when the disease was contracted. The decision in *Broderick* v. *London County Council* (4) is based on the finding that no one could say exactly how, when, or where the disease was contracted. *Brintons, Limited* v. *Turvey* (5) is the only case where a disease has been held to be "injury by accident," but in that case there was a finding that at a particular time and place there was a fortuitous intrusion of a foreign substance into the man's eye which caused death. To prove "injury by accident" there must be the happening of an event at a particular time or place. The evidence here is that the deceased was opening cesspools on four or five occasions, and no exact date can be fixed on which the poisoning took place, and none was given in the application or arbitration.

(1) [1909] 1 K. B. 957.
(2) (1910) Butterworth's Compensation Cases, vol. iii., p. 210.
(3) [1905] 2 K. B. 232.
(4) [1908] 2 K. B. 807.
(5) [1905] A. C. 230.

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R. J. J. Willis, for the applicant, was directed to confine himself to the question whether this was a case of "injury by accident."

In *Steel* v. *Cammell, Laird & Co., Ld.* (1) the workman was engaged in a dangerous occupation; in the present case the deceased was not usually employed in work that necessarily exposed him to the danger of sewer gas as was the case in *Broderick* v. *London County Council.* (2) This was an accident in the popular sense of the term which in *Brintons, Limited* v. *Turvey* (3) is stated to be the effect of the Act. It was certainly an unintended and unexpected occurrence, as Lord Lindley said in *Fenton* v. *Thorley* (4), and as in *Ismay, Imrie & Co.* v. *Williamson.* (5)

The evidence proves that the workman died of ptomaine poisoning and is sufficient to justify the finding that he died from poison contracted while working at the cesspools.

Eldon Bankes, K.C., replied.

COZENS-HARDY M.R., after stating the facts, continued:—This man's case was admitted to be very obscure. The two doctors who attended him conceded that. There was no post-mortem examination, and no notice was given until December 13. The first point taken by the appellant's counsel was that the applicant, the widow, made no claim on the footing that this man died of an accident in August due to ptomaine poisoning till December, and it was said that the notice ought to have been given much earlier, in the language of s. 2 of the Act, "as soon as practicable after the happening thereof," and it was argued that the employer was very much prejudiced by not having had notice of the claim, or of the intention to make the claim, at a time when it would have been possible for him to have had a post-mortem examination held so as to have settled conclusively that which is now obscure. In my opinion this objection ought not to prevail. Sect. 2 of the Act says: "Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident

(1) [1905] 2 K. B. 232.
(2) [1908] 2 K. B. 807.
(3) [1905] A. C. 230.
(4) [1903] A. C. 443.
(5) [1908] A. C. 437.

has been given as soon as practicable after the happening thereof." Then comes a proviso (*a*), "the want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings if it is found in the proceedings for settling the claim that the employer is not, or would not, if a notice or an amended notice were then given and the hearing postponed, be prejudiced in his defence by the want, defect, or inaccuracy." That is the first limb in the proviso. Then comes the second limb, "or that such want, defect, or inaccuracy was occasioned by mistake, absence from the United Kingdom, or other reasonable cause." The second limb of the proviso has nothing whatever to do with the prejudice caused to the employer by the want of notice. It says the want of notice shall not be a bar if the want was occasioned by a reasonable cause. In my opinion there was abundant reasonable cause here for not giving the notice. Neither of the doctors was at the time prepared to say that there had been an accident within the meaning of the Act. The wife, of course, knew that her husband was very ill, and ill from a disease from which he died, but it was not present to any of their minds that there had been an accident in respect of which notice should have been given. I think, therefore, that there was "reasonable cause" for not giving the notice, and although the absence of notice may have, to some extent, prejudiced the employer, in my opinion it does not prevent the applicant from succeeding if she can prove that it was an injury by accident within the meaning of s. 1, sub-s. 1.

That leaves only this question: Was there "an injury by accident arising out of and in the course of the employment"? In my opinion there was not. This Court and the House of Lords have been engaged again and again in discussing that word "accident," and so far as I am aware neither this Court nor the House of Lords has ever attempted to say that a mere disease without accident, not attributed to something which may properly be called an accident, entitles a workman to compensation under the Act. No doubt there have been some cases which were very near the line. There was the case which is always cited on these occasions of *Brintons, Limited* v. *Turvey* (1), but

(1) [1905] A. C. 230.

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in that case the decisions, both in this Court and in the House of Lords, entirely turned upon this, that it was found as a fact by the learned county court judge, who was the judge of fact, that the anthrax of which the man died was due to the circumstance that at a particular time and at a particular place a particle came from the wool with which he was dealing, settled in the man's eye, and set up the disease which caused his death. In the face of that particular finding of fact the Court held that it was an accident, and that it was an accident which resulted in his death from anthrax. But I think all the judges carefully abstained from lending colour to the suggestion that a mere disease which you could not say was contracted at a particular time and at a particular place by a particular accident was an accident which entitled a man to compensation. I may, perhaps, venture to refer to my own judgment in that case, only because it is quoted with approval by Lord Lindley in giving his judgment in the House of Lords in that case. I there say (1): "I should be very sorry to hold that every disease contracted by a workman on the premises is a disease contracted in the course of the employment, or as a result arising from accident in the course of employment." It is not necessary to go further than that. Reference was also made to the case of *Ismay, Imrie & Co.* v. *Williamson* (2), which on this point was, I think, a clear case, though there was difficulty about it in other respects. But that there was an accident there could scarcely be doubted. There the man was brought up from the furnace hole below and taken at once to the place which was used as a hospital on the ship, and there he died within a couple of hours. That is analogous really to the case of sunstroke, and it was not in any sense like an ordinary disease. It was a case in which the stroke of the heat from the furnace involved the same effect as a sunstroke in the air. But then we come rather near to this present case in the recent decision of this Court in *Broderick* v. *London County Council.* (3) That was a case in which a man was employed by the London County Council in connection with the sewers, and his work, no doubt, brought him

(1) [1904] 1 K. B. 328, at p. 338. (2) [1908] A. C. 437.
(3) [1908] 2 K. B. 807.

frequently in contact with sewer gas. He contracted a disease which is called enteritis, and the learned judge of the county court held that the contracting of enteritis in this manner was not an injury by accident within the meaning of the Act. This Court affirmed that view. We did not in any way base our judgment, so far as I remember, and so far as the report bears out, upon the circumstance that the workman there was engaged in an occupation which more than ordinarily exposed him to the risk of sewer gas. We took the view that it was a case of disease—a disease without the addition of accident—a disease, no doubt, contracted at some time, we could not say when, and we could not say where, but a disease which was contracted, and which was due to sewer gas having got into his system, and we held that that was not sufficient to entitle the workman's dependants to compensation, on the simple ground that the element of accident was wanting in that case. I have no desire to take up time by reading what I there say in giving the judgment of this Court, but we should be doing what was inconsistent with the decision in the case of *Broderick* v. *London County Council* (1) if we did not allow this appeal.

I have thus far made no mention of one portion of the Act which seems to me to be of great value as explaining the position. Under the Act of 1896 disease apart from accident did not entitle a workman to compensation. That was decided again and again. But by s. 8 of the Act of 1906 the provisions of the Act are applied to certain scheduled diseases, which are extended from time to time by orders made by one of the Government departments, and the section provides that where the certifying surgeon certifies that the workman is suffering from one of the scheduled diseases, and is disabled from earning full wages, or is suspended from his usual employment, or has died from such disease "and the disease is due to the nature of any employment in which the workman was employed at any time within twelve months previous to the date of the disablement or suspension, whether under one or more employers, he or his dependants shall be entitled to compensation under this Act as if the disease or such suspension as aforesaid were a personal injury by accident

(1) [1908] 2 K. B. 807.

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arising out of and in the course of that employment." That is to say, true, it is not an accident, but the disease shall be treated as though it were a personal injury by accident; disablement is to be treated as the happening of the accident, not when the original source of the mischief got into the man's system, but the moment at which, and no earlier than the moment at which, the actual disablement takes place. That for the purpose of the scheduled diseases is treated as "an accident." In my opinion, therefore, except in the case of these industrial or scheduled diseases, unless the applicant can indicate the time, the day, and circumstance, and place, in which the accident has occurred by means of some definite event, the case cannot be brought within the general purview of the Act, and does not entitle the workman or his dependants to compensation.

In my opinion, the learned judge below was wrong in holding that the workman died from the results of poisoning contracted while working on the cesspools, whether it is called ptomaine or toxin poisoning. That seems to me to be a finding not sufficient to bring the case within what was decided in *Brintons, Limited* v. *Turvey* (1), and is not in any way sufficient to enable us to say as a matter of law that there is any accident here within the meaning of the Act.

In my opinion this appeal must be allowed.

FARWELL L.J. I am of the same opinion on both grounds stated by the Master of the Rolls. I will not add anything on the first ground. On the second ground I think that when the cases are considered it is clear that all the judges have always been careful to say, as they did in *Brintons, Limited* v. *Turvey* (1), "that the decision in this case will not be regarded as involving the doctrine that all diseases caught by a workman in the course of his employment are to be regarded as accidents within the meaning of the Workmen's Compensation Act." The question what has happened is a question of fact for the judge, and the judge here has found two facts which shew that this case is not within *Brintons, Limited* v. *Turvey*. (1) First, he has found that it is not possible to give a day as the date of the

(1) [1905] A. C. 230.

alleged accident. The time of the accident is sufficiently given, he says, under the circumstances. I do not know what he means by that, but the first finding is that it is impossible to give a day as the date of the accident, and the next is that the workman died from the results of poisoning contracted whilst working on the cesspools, whether it is called ptomaine or toxin poisoning. This is analogous to saying that he died from the results of cold contracted some time or other during the last month by working in a factory. That is not the sort of specific finding which is required to support the conclusion that an accident within the meaning of the Act has happened. Not only does Lord Lindley point out that limitation on the authorities, but it is recognized in *Ismay, Imrie & Co.* v. *Williamson* (1) by Lord Ashbourne, who was one of the majority of two in the case. He says: "I do not at all say that all diseases arising out of or in the course of employment should be regarded as a personal injury by accident, but I am of opinion that under the circumstances of this case and its facts Williamson was killed by a personal injury by accident, and that the appellants are accordingly liable." Then Lord Macnaghten goes on to point out (2) that the expression "personal injury by accident" would be "equally applicable or equally inapposite in the case of an attack of bronchitis or pneumonia brought on by a sudden and violent chill disregarded or neglected at the outset." The differences of opinion—and there have been many differences in the House of Lords on this point—have all been on the point whether there was any accident outside to which the disease from which the man died could be attributed. That is quite plain if the various speeches in *Brintons, Limited* v. *Turvey* (3) are carefully read. Lord Robertson, with his usual acumen, attacked the conclusions of the majority, and pointed out that the logical result was that all diseases contracted by the workman in the course of his employment were within the meaning of the Act, but he goes on to point out that the illustrations given by the other learned Lords who did not agree with him were all cases in which there was postulated an accident distinct from

(1) [1908] A. C. 437, at p. 441. (2) At p. 441.
(3) [1905] A. C. 230.

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the disease and the decision was therefore based on the existence of such antecedent accident. The finding of the county court judge in *Brintons, Limited* v. *Turvey* (1) is this: "I find as a fact that the anthrax, which was the immediate cause of death, was caused by the accidental alighting of a bacillus from the infected wool on a part of the deceased's person which afforded a harbour in which it could multiply and grow and so cause a malignant disease and death. I can see no distinction in principle between the accidental entry of a spark from an anvil or the accidental squirting of scalding water or some poisonous liquid into the eye. The only difference is that in those cases the foreign substance would be so large as to be visible, while in this case the foreign substance was microscopic." Lord Macnaghten bases his judgment on that finding and says (2): "It was an accident that the noxious thing that settled on the man's face happened to be present in the materials which he was engaged in sorting. It was an accident that this noxious thing escaped the down draught or suck of the fan which the Board of Trade, as we are told, requires to be in use while work is going on in such a factory as that where the man was employed. It was an accident that the thing struck the man on a delicate and tender spot in the corner of his eye," and so on. Here there is no suggestion of any striking of any specific ascertainable thing at any particular time on any particular spot. On the contrary, the learned judge says he cannot find any time at which anything happened, and I am wholly unable to distinguish the present case from the case of a workman standing at some time unknown in a draught and catching cold. It appears to me that there is no ground whatever for saying that there is anything which can be called an outside accident causing a particular disease from which this man died. We had a case not long ago of a man who died from the extra exertion caused by lifting a log. The extra exertion caused an aneurism to burst and was the accident which caused the death. If the man had been walking from one part of the warehouse to another, we could not have come to such a conclusion because there would have been no supervening accident.

(1) [1905] A. C. 230. (2) [1905] A. C. at p. 234.

On those grounds, in my opinion, the county court judge's finding is not sufficient to support his decision.

KENNEDY L.J. I quite agree, on the first point, that there is nothing in the argument of the appellant, and, on the second point, I am not prepared to differ from the judgments that have been pronounced, but in saying that I must express my own feeling of doubt on the point. The judgments delivered in the House of Lords and elsewhere which have been cited to us on this part of the case do not seem to me to supply any perfectly satisfactory test to be applied to such a case as the present. The Act of Parliament requires an injury by accident arising out of and in the course of the employment. That is clear. But as to what is an accident it is very difficult to say in many cases. In the case of *Broderick* v. *London County Council* (1) I entirely assented, and I still assent, to the reasoning which was fully and clearly expressed by the Master of the Rolls in his judgment, and in the course of which he cited what Mathew L.J. insisted on in *Steel* v. *Cammell, Laird & Co., Ld.* (2), that is that where you have a man following a dangerous occupation, and you cannot give a date, the case is not within the Act, except in regard to these particular classes of disease which are now scheduled. It is hardly a lawyer's question. Here the case is this. A man not employed in sewer work at all, but employed as caretaker and labourer, is asked to assist in opening up some cesspools; there are three or four dates given, all within about a week, during which he was employed in this work, and it seems to me that it is impossible to put that evidence exactly on the same basis as the findings of fact in the cases to which reference has been made, as, for instance, *Broderick* v. *London County Council* (1), where the man was inhaling sewer gas in the course of his regular employment by the London County Council in sewers. You cannot say in such a case that there was an accident, because it may be the cumulative result of weeks or months, or years, of such work. Here you have a man set to do a particular job. He goes down to it, and the result is an illness, and it is found by the county court judge that it is

(1) [1908] 2 K. B. 807. (2) [1905] 2 K. B. 232.

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due to the inhalation, or getting into his body—putting it in the most general form—of a toxin in the form of bacteria. I quite see that the wording of the county court judge's judgment in *Brintons, Limited* v. *Turvey* (1) was much stronger and clearer, and I cannot help thinking that there was evidence adduced in this case in the county court which would have justified the judge in saying "I find that on one or other of the three visits made to the cesspools bacteria from sewage entered that man's body and produced the toxin poisoning," but he has not so found. There has been suggested the case of a man catching a cold, but I think we are getting into a different region there altogether. There is no accident there. According to the judgment of the House of Lords, if you can prove that on a particular day, though nobody saw it, a particular bacterium from the wool struck his eye, because his eye was afterwards found to be diseased, that is an accident. It is not easy, I think, to draw a clear line of distinction between that and what might, I think, have been found here, on the medical evidence, that the death was due to toxin poisoning which got into his body on one or other of the particular occasions on which the deceased worked in the cesspools. I agree, however, that in supporting the judgment of the learned county court judge we should be going rather further, as the findings stand, than any judgment that has yet been given has gone in regard to what constitutes an accident. As it stands, I cannot find any authority that would justify us in upholding this judgment, although, for reasons which Lord Robertson indicates in *Brintons, Limited* v. *Turvey* (1), I feel, speaking for myself, that it is difficult to distinguish such a case as the present from the case with which the Courts had there to deal.

Appeal allowed.

Solicitors: *Watson, Sons & Room; Whites & Co., for R. W. Blyth, Chelmsford.*

(1) [1905] A. C. 230.

W. C. D.

[IN THE COURT OF APPEAL.]

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1910

July 11, 12, 21.

NISBET *v.* RAYNE & BURN.

Employer and Workman—Compensation—Accident arising out of the Employment—Cashier—Murder—Risks incidental to the Employment—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A cashier, while travelling in a railway carriage to a colliery with a large sum of money for the payment of his employers' workmen, was robbed and murdered. On an application by his widow for compensation:—

Held, that the murder was an "accident" from the standpoint of the person who suffered from it, and that it arose "out of" an employment which involved more than the ordinary risk, and consequently that the widow was entitled to compensation under the Workmen's Compensation Act, 1906, s. 1, sub-s. 1.

Challis v. *London and South Western Ry. Co.*, [1905] 2 K. B. 154, applied.

Appeal against an award of the judge of the county court of Newcastle-upon-Tyne sitting as arbitrator under the Workmen's Compensation Act, 1906.

The main question raised by this appeal was whether murder was an "accident" within the meaning of the Act. The facts were very short and were as follows. The applicant was the widow of John Innes Nisbet, the victim of the Morpeth train murder, who claimed compensation from Messrs. Rayne & Burn, as the Stobswood Coal Company, for the death of her husband. The admitted statement of facts shewed that Nisbet, in respect of whose death the application was being made, was a workman to whom the Act applied; that he was in the employment of the respondents at the time of his death and was in receipt of 2*l.* 15*s.* a week; that his death took place on March 18, 1910, whilst in the execution of his duty when he was carrying money to Stobswood Colliery on behalf of the respondents in a railway carriage on the North Eastern Railway; and that his death was caused by pistol or revolver shots fired by some one other than Nisbet himself. The county court judge held that the risk undertaken by Nisbet in carrying a large sum of money was a risk incidental to his employment and likely to have been in the contemplation of the parties when Nisbet was engaged,

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and he accordingly made an award in favour of the applicant for 300*l*. The respondents appealed.

The appeal was heard on July 11 and 12.

C. A. Russell, K.C., and *Griffith Jones*, for the appellants. In the first place this murder was not an accident within the meaning of the Act. The tortious act of some third person, which had no relation whatever to the employment, is not an "accident" for which an employer is liable: *Armitage* v. *Lancashire and Yorkshire Ry. Co.* (1); *Fitzgerald* v. *W. G. Clarke & Son.* (2) In *Challis* v. *London and South Western Ry. Co.* (3), which was relied on by the applicant, the question of accident was not argued. It was admitted in that case that there had been an accident, and the only question was whether it could be said to be an accident arising "out of the employment." Death in this case resulted from the intentional act of the murderer, and intention excludes any idea of accident.

[COZENS-HARDY M.R. Suppose a gamekeeper is injured by poachers, could it be said that that was not an accident arising out of his employment?]

It would not be an accident. The keeper who had been deliberately hit on the head by the poacher would be the last person to describe his injury as accidental. The question of injury to a gamekeeper was very recently considered in *Anderson* v. *Balfour* (4) by the Court of Appeal in Ireland, where the majority of the Court considered that compensation was payable. Compensation is not given for any injury a man may receive in the execution of his duty, it must be an injury by accident. The Police Act, 1890, specially provides for "injury received in the execution of duty." The county court judge seems to have been impressed with Lord Coke's definition of an accident "as when a servant of an obligor, mortgagor, &c. is sent to pay the money on the day, and he is robbed" (5), but that refers only to relief in equity for non-production of the money or deeds at a given date.

The accident, if it was one, did not arise "out of the

(1) [1902] 2 K. B. 178.
(2) [1908] 2 K. B. 796.
(3) [1905] 2 K. B. 154.
(4) [1910] 2 I. R. 497.
(5) 4 Co. Inst. 84.

employment"; on this point *Challis* v. *London and South Western Ry. Co.* (1) is distinguishable. The risk of being murdered while carrying money cannot be treated as a risk incidental to the deceased's employment. In all the cases the fact that the act causing injury was tortious negatived the idea that it arose out of the employment. *Armitage* v. *Lancashire and Yorkshire Ry. Co.* (2), *Fitzgerald* v. *W. G. Clarke & Son* (3), and *Collins* v. *Collins* (4) are conclusive on this point.

Danckwerts, *K.C.*, and *J. R. Randolph*, for the applicant. This was clearly an accident so far as the deceased was concerned. Neither the employers nor the servant ever contemplated that such an event would happen; the event was wholly unexpected, and is exactly within the definition given by Lord Loreburn L.C. in *Clover, Clayton & Co., Ld.* v. *Hughes* (5), "an unlooked for mishap or an untoward event which is not expected or designed." The unexpectedness must be on the part of the injured person. It was an accident that the deceased met the man in the train who shot him.

The carrying of large sums of money weekly was part of the deceased's employment, a more than ordinary risk which was undertaken by him, which must have been in the contemplation of the parties when he was engaged. Persons regularly carrying money about must run the risk of being robbed. The injury causing death clearly arose "out of" the employment and as incidental to it, just as in *Anderson* v. *Balfour* (6), and as pointed out in *Fitzgerald* v. *W. G. Clarke & Son.* (3)

C. A. Russell, *K.C.*, in reply. Any one with anything to lose is always liable to be robbed and, if he defends his property, to be injured, but that is not a risk incidental to any particular employment, and the accident must be reasonably incidental to the employment. Everything undesigned or unexpected is not an accident.

Cur. adv. vult.

July 21. COZENS-HARDY M.R. This appeal raises a very curious question under the Workmen's Compensation Act.

(1) [1905] 2 K. B. 154.
(2) [1902] 2 K. B. 178.
(3) [1908] 2 K. B. 796.
(4) [1907] 2 I. R. 104.
(5) [1910] A. C. 242, at p. 244.
(6) [1910] 2 I. R. 497.

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Nisbet was a cashier employed by the appellants, and in the course of his duty was in the habit of conveying large sums of money from Newcastle to a colliery owned by the appellants for the payment of the wages of the colliers. While travelling in the train in the discharge of this duty the bag of money was stolen and he himself was killed, his death being caused by shots fired from a revolver or pistol. This was obviously a criminal act, whether robbery alone was intended or whether murder was directly contemplated. The widow claims compensation by reason of her husband's death. It is contended by the employers that this was not an "accident" within the meaning of the Act, because it was an intentional felonious act which caused the death, and that the word "accident" negatives the idea of intention. In my opinion this contention ought not to prevail. I think it was an accident from the point of view of Nisbet, and that it makes no difference whether the pistol shot was deliberately fired at Nisbet or whether it was intended for somebody else and not for Nisbet. The point was incidentally decided by this Court in *Challis* v. *London and South-Western Ry. Co.* (1), where an engine-driver was injured by a stone wilfully dropped on a train by a boy on a bridge. The very recent case of *Anderson* v. *Balfour* (2) in the Court of Appeal in Ireland is a direct decision on the point. A gamekeeper was attacked by three poachers and wounded. The majority of the Court held that the gamekeeper was entitled to the benefit of the Act, notwithstanding that the act of the poachers was criminal and done with wilful intention.

It remains, however, to consider whether the accident arose not only "in the course of" the employment, as it clearly did, but "out of" the employment. This really depends upon the nature of the man's duties and the extent to which those duties involved him in special risk. In the case of the gamekeeper above referred to it was held, and I think rightly, that his employment was necessarily attended with special risk of assault by poachers. The only question which caused doubt in my mind is whether in the discharge of his duties Nisbet was exposed to special risk. Upon the whole I think he was. A man who is known to be carrying a bag of money is a tempting object for

(1) [1905] 2 K. B. 154. (2) [1910] 2 I. R. 497.

criminals to attack. In old days, when highway robberies were more frequent, this would not have been doubted. The case of *Andrew* v. *Failsworth Industrial Society* (1) is an important authority on this point. Any man may be struck by lightning, and in many circumstances this would not entitle him to compensation. If, however, the nature of his employment exposes him to more than the ordinary normal risk, the extra danger to which the man is exposed is something arising out of his employment. Thus a workman who was killed by lightning while working on a high scaffolding was held to have met his death by an accident arising out of as well as in the course of his employment. The learned county court judge has found that the fact that Nisbet carried the money in the bag was the reason why the robbery and the murder were committed, and that this was a risk incidental to the employment of a man to carry money about, and that it has been so from the earliest times. In my opinion the learned county court judge was justified in that finding. I think the appeal fails and must be dismissed with costs.

FARWELL L.J. The deceased man was a cashier in the employment of the appellants, who are colliery owners, and it was part of his duty to take the money necessary to pay the men's wages on the regular pay days to the colliery, and for this purpose to travel by rail to the colliery; and while he was thus engaged on March 18, 1910, he was robbed and murdered in the train. The question is whether he met his death by accident arising out of and in the course of his employment.

It is argued, first, that there was no "accident" at all, because death resulted from the intentional act of the murderer, and intention excludes any idea of accident. But the intention of the murderer is immaterial; so far as any intention on the part of the victim is concerned, his death was accidental; and although it is true that one would not in ordinary parlance say, for example, that Desdemona died by accident, this is because the horror of the crime dominates the imagination and compels the expression of the situation in terms relating to the crime

(1) [1904] 2 K. B. 32.

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and the criminal alone: it would be quite natural to say that a man who died from the bite of a dog or the derailment of a train caused by malicious persons putting an obstacle on the line died by accident. But the point is covered by the decision in *Challis* v. *London and South Western Ry. Co.* (1), where Lord Collins, then Master of the Rolls, says: "He"—that is, the county court judge—"appears to me to have decided that, as the stone was wilfully dropped, it was an intentional act, and, therefore, there could not be said to have been an accident. I think that the judge was wrong in so holding. I do not think that there was anything in the fact that the stone was wilfully dropped to prevent what happened from being an accident from the standpoint of the person who suffered through it"; and by the Irish case of *Anderson* v. *Balfour*. (2)

Then it is said that the accident did not arise out of and in the course of his employment. It is plain that it arose in the course of his employment; it was part of his regular duty to take the money required for the wages on pay day by train to the colliery; it was his duty to carry it safely and to protect it from thieves and robbery; but the real difficulty is, Can the accident be said to arise out of the employment? Now it has been held in *Challis* v. *London and South Western Ry. Co.* (1), already referred to, that an engine-driver who died from the effects of glass driven into his eye by a stone thrown from a bridge under which the train passed died from such an accident, because it is common knowledge that mischievous boys will throw stones at trains, and the risk thereof is therefore a risk known to be and accepted as incidental to the employment of an engine-driver on a railway. So it was held in the Irish case of *Anderson* v. *Balfour* (2) that the risk of injury and death at the hands of poachers is incidental to the employment of a game-keeper in Ireland; while in *Collins* v. *Collins* (3) it was held that the risk run by a road labourer of being stabbed in a brawl, if he interfered to help his employer, was not so incidental.

I have come to the conclusion that there is a distinct and well-known risk run by cashiers and the like who are known to

(1) [1905] 2 K. B. 154, at p. 156. (2) [1910] 2 I. R. 497.
(3) [1907] 2 I. R. 104.

carry considerable sums in cash on regular days by the same route to the same place, of being robbed and, if they do their duty by defending their charge, murdered, and that such a risk is as incidental to their employment as the risk from missiles from bridges is to the employment of engine-drivers or the risk of injury by poachers to that of gamekeepers.

I am therefore of opinion that this appeal should be dismissed with costs.

KENNEDY L.J. In this case I think that the judgment of the learned county court judge was right.

The murder of the deceased cashier undoubtedly happened in the course of his employment. I am of opinion that it also arose out of his employment. As cashier he was habitually entrusted with the personal duty of travelling to and fro with large sums of money for the payment of his employers' workmen. Thereby he became specially subjected to the risk which caused his death—the risk of personal violence inflicted upon him in order to rob him of that money. In the case of *Falconer* v. *London and Glasgow Engineering and Shipbuilding Co.* (1) the Lord Justice Clerk said "It was against accidents incidental to the special employment that the benefit of this statute was given." In fact, he so met with his death.

What the appellants mainly urge, however, is that, even if the death arose out of and in the course of the employment, it was not within the meaning of the words "injury by accident." I agree that there is no English decision which is exactly in point. The nearest, *Challis* v. *London and South Western Ry. Co.* (2), is at least to some extent distinguishable. The Court there held that where an engine-driver was injured by the wilful and tortious act of a boy who dropped a stone upon the passing train, and so broke glass which entered the man's eye, it was a case for compensation under s. 1, sub-s. 1. But there the act of the boy in dropping the stone upon the train, probably, I suppose, to fall into the funnel of the engine, though wilful and tortious, was not intended to cause injury either to the engine-driver or to any one else; so far as the result to the injured man was

(1) (1901) 3 F. 564. (2) [1905] 2 K. B. 154.

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concerned, it was alike in relation to the wrong-doer and to the mind of the boy who dropped the stone "accidental" in the ordinary and natural meaning of the word, whereas death by wilful murder certainly is not. An historian who described the end of Rizzio by saying that he met with a fatal accident in Holyrood Palace would fairly, I suppose, be charged with a misleading statement of fact. Nor does it much help the respondents that Lord Coke has said in the passage referred to by the learned county court judge (I am not quoting the exact words) that equity would extend indulgence to the non-production of documents, otherwise necessary, if the non-production was due to the robbery of them, and therefore to be excused as accidental. But whilst the description of death by murderous violence as an "accident" cannot honestly be said to accord with the common understanding of the word, wherein is implied a negation of wilfulness and intention, I conceive it to be my duty rather to stretch the meaning of the word from the narrower to the wider sense of which it is inherently and etymologically capable, that is, "any unforeseen and untoward event producing personal harm," than to exclude from the operation of this section a class of injury which it is quite unreasonable to suppose that the Legislature did not intend to include within it. If the word be so interpreted the expression "an injury by accident arising out of and in the course of the employment" includes the death of the deceased in the present case, and also the similar case suggested in the course of the argument—the hurt or death of a gamekeeper through violence used to him by poachers whilst he is discharging the duties of his service.

Appeal dismissed.

Solicitors: *Rawle, Johnstone & Co., for Cooper & Goodger, Newcastle-upon-Tyne; Chester & Co., for D. M. Dodd, Newcastle-upon-Tyne.*

W. C. D.

[IN THE COURT OF APPEAL.]

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June 23, 28.

In re JOHN TWEDDLE & COMPANY, LIMITED.

Company—Winding-up—Official Receiver and Liquidator—Report alleging Fraud—Public Examination of Person charged—Person exculpated from Charge—Costs—Proceeding—Jurisdiction to order Official Receiver to pay Costs personally—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 8.

A company having been ordered to be wound up in a county court, the official receiver, who was the liquidator, in his further report to the Court under s. 8, sub-s. 2, of the Companies (Winding-up) Act, 1890, stated that in his opinion the facts set out therein constituted a fraud committed in the promotion or formation of the company, and also in relation to the company since its formation, and that the persons named in the schedule to the report were parties to the fraud. Among the persons so named was E., a director of the company. Upon this report the county court judge made an order under sub-s. 3 for the public examination of the persons named. After the public examination E. applied to the judge for an order exculpating him from the charge of fraud; this application was opposed by the official receiver, but the judge nevertheless made an order exculpating him, and directing the official receiver personally to pay to E. the costs of his examination and of the application, there being no available assets of the company :—

Held, that so far as the costs of the public examination of E. were concerned the official receiver was merely discharging a statutory duty of a judicial character, and that there was no jurisdiction to order him personally to pay these costs. The proviso in s. 8, sub-s. 7, of the Act of 1890, empowering the Court to "allow" the exculpated person such costs as the Court might think fit, only applies where there are assets of the company available for the payment of costs.

Decision of Darling and Bucknill JJ., ante, p. 67, affirmed.

Held, also, that as the official receiver had accepted the position of a litigant, appeared in Court, and opposed E.'s application for exculpation, he was a party to "proceedings" in the county court, so that the judge had jurisdiction in his discretion to order him to pay the costs of that motion, and on this part of the case the Court could not interfere.

In re Raynes Park Golf Club, [1899] 1 Q. B. 961, doubted.

Appeal from the decision of a Divisional Court. (1)

A company entitled John Tweddle & Company, Limited, was registered on June 1, 1906, under the Companies Acts, the company being formed for the purpose of acquiring the business of

(1) Ante, p. 67.

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ironfounders, plumbers, and stone grate merchants, which had previously been carried on under the style of John Tweddle & Company. The registered office of the company was at Newcastle-upon-Tyne, and the nominal capital was 20,000*l.*, of which less than 10,000*l.* was issued and fully paid up. Upon May 21, 1908, the company was ordered to be wound up in the Newcastle-upon-Tyne County Court, and on July 6, 1908, the official receiver as the liquidator of the company made a preliminary report upon the affairs of the company under s. 8, sub-s. 1, of the Companies (Winding-up) Act, 1890 (1), and on September 25

(1) 53 & 54 Vict. c. 63, s. 8:

"(1.) Where the Court has made an order for winding up a company, the official receiver shall, as soon as practicable after receipt of the statement of the company's affairs, submit a preliminary report to the Court—

"(*a*) as to the amount of capital issued, subscribed, and paid up, and the estimated amount of assets and liabilities; and

"(*b*) if the company has failed, as to the causes of the failure; and

"(*c*) whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company, or the conduct of the business thereof.

"(2.) The official receiver may also, if he thinks fit, make a further report, or further reports, stating the manner in which the company was formed and whether in his opinion any fraud has been committed by any person in the promotion or formation of the company, or by any director or other officer of the company in relation to the company since the formation thereof, and any other matters which in his opinion it is desirable to bring to the notice of the Court.

"(3.) The Court may, after consideration of any such report, direct that any person who has taken any part in the promotion or formation of the company, or has been a director or officer of the company, shall attend before the Court on a day appointed by the Court for that purpose, and be publicly examined as to the promotion or formation of the company, or as to the conduct of the business of the company, or as to his conduct and dealings as director or officer of the company.

"(4.) The official receiver shall take part in the examination, and for that purpose may, if specially authorized by the Board of Trade in that behalf, employ a solicitor with or without counsel.

"(5.) . . . .

"(6.) The Court may put such questions to the person examined as to the Court may seem expedient.

"(7.) The person examined shall be examined on oath, and it shall be his duty to answer all such questions as the Court may put or allow to be put to him. The person examined shall at his own cost prior to such examination be furnished with a copy of the official receiver's report, and shall also at his own cost be entitled to employ at such examination

following he made a further report under sub-s. 2, which he concluded by stating that he was of opinion that the facts set out in the report constituted a fraud committed in the promotion or formation of the company and also in relation to the company since the formation thereof, and that the persons named in the schedule thereto were parties to such frauds. Certain directors of the company were named in the schedule, among them being the respondent Easten. The official receiver applied to the county court judge to fix a day for the consideration of the report, and the judge, having considered the report, ordered a public examination of the persons so named. After the public examination Easten applied to the judge for an order exculpating him from the charge of fraud made against him in the report; the official receiver appeared and strenuously opposed the application, but the county court judge nevertheless made an order exculpating Easten, stating that he was satisfied after having heard Easten's evidence that he was in no way guilty of any fraud; he also made an order that the official receiver should pay to Easten the costs of his public examination and of the

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a solicitor with or without counsel, who shall be at liberty to put such questions to the person examined as the Court may deem just for the purpose of enabling that person to explain or qualify any answers given by him. Provided always that if such person is, in the opinion of the Court, exculpated from any charges made or suggested against him, the Court may allow him such costs as the Court in its discretion may think fit . . . .

"(9.) A public examination under this section may, if the Court so directs, and subject to general rules, be held before any judge of county courts, or before any officer of the Supreme Court, being an official referee, master, registrar in bankruptcy, or chief clerk, or before any district registrar of the High Court named for the purpose by the Lord Chancellor . . . . and the powers of the Court under sub-sections six, seven, and eight of this section may (except as to costs) be exercised by the person before whom the examination is held."

The Companies (Winding-up) Act, 1890, has been repealed by s. 286 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), but the above provisions of s. 8 of the Act have been re-enacted in ss. 148 and 175 of the Act of 1908. By s. 287 of this latter Act, where the winding-up of a company has commenced before the commencement of the Act of 1908, namely, April 1, 1909, the Act of 1908 shall not apply, but for the purposes of winding up the Act or Acts under which the winding-up commenced shall be deemed to remain in full force.

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application. It was admitted that the company had no available assets out of which the official receiver could reimburse himself the costs so ordered to be paid, and the effect of the order was, as the judge intended, that the official receiver would have to pay the costs personally.

The official receiver appealed to the Divisional Court against so much of the order as directed him to pay the costs.

The Divisional Court (Darling and Bucknill JJ.) held that the order for payment of costs by the receiver personally must be discharged.

Easten appealed. The appeal was heard on June 23 and 28.

On the main question whether there was jurisdiction to order the official receiver to pay these costs personally, counsel for the appellant and for the official receiver cited the same cases and relied on the same arguments which had been submitted to the Divisional Court, and it is not thought necessary to repeat them. A further point was, however, raised on the appeal as to the costs of the motion for exculpation, and on this point only the arguments on appeal are given.

Gore-Browne, K.C., and *Lowenthal*, for the appellant. The official receiver in this case occupied the double position of official receiver and liquidator; therefore he had to be served, but as official receiver his statutory duty was finished: he need not have appeared; he certainly need not have opposed the application for exculpation: he did, however, appear, and strenuously opposed the application. He therefore accepted the position of a litigant and took his part in "proceedings" before the Court relating to the administration of the assets of this company, and by s. 5 of the Supreme Court of Judicature Act, 1890, the judge has full power "to determine by whom and to what extent such costs are to be paid." *In re Appleton French & Scrafton, Ld.* (1) seems to cover this point.

[COZENS-HARDY M.R. In that case the winding-up was in the High Court; in the present case the winding-up is in the county court.]

The county court has jurisdiction to deal with these matters also.

(1) [1905] 1 Ch. 749.

Sect. 1, sub-s. 6, of the Companies (Winding-up) Act, 1890, provides that "Every Court" and therefore the county court "having jurisdiction to wind up a company shall for the purposes of that jurisdiction have all the powers of the High Court." This point was considered in *In re New Par Consols.* (1) The county court judge having therefore jurisdiction as to these costs, this Court cannot interfere, and the official receiver is therefore personally liable to pay the costs of unsuccessfully opposing this motion even if he is not liable to pay the costs of the public examination.

Sir Rufus Isaacs, S.-G., and *Hansell*, for the official receiver. No distinction was drawn in the county courts between the costs of the examination under s. 8, sub-ss. 3 and 4, and the costs of the application for exculpation. The order directs the official receiver to personally pay all the costs, and this was wrong. There is nothing to shew that the order was made against the official receiver in his capacity as liquidator. Costs may sometimes be given against a liquidator—*In re Powell & Sons* (2)—but this power is very seldom exercised. The official receiver was served and was therefore bound to attend.

[COZENS-HARDY M.R. He seems to have accepted the position of a litigant and opposed the motion.]

Gore-Browne, K.C., in reply.

COZENS-HARDY M.R. This appeal raises questions of importance and of considerable difficulty as to the position of an official receiver in the winding-up of a company in a county court. It turns really upon what is the true meaning and effect of s. 8 of the Companies (Winding-up) Act, 1890, a section which has been substantially re-enacted in ss. 148 and 175 of the Companies (Consolidation) Act, 1908. Sect. 8 says—I am reading it shortly—that where there has been an order for winding up a company the official receiver has imposed upon him certain statutory duties. The first of those duties is that as soon as possible after receipt of the statement of the company's affairs he has to submit a preliminary report to the Court. Next, if he thinks fit, he may make a further report

(1) [1898] 1 Q. B. 573. (2) [1896] 1 Ch. 681.

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stating the manner in which the company was formed and whether in his opinion any fraud has been committed by any person in the promotion or formation of the company or by any director or other officer of the company in relation to the company since the formation thereof, and any other matters which in his opinion it is desirable to bring to the notice of the Court.

Now it has not been disputed, and it could not be disputed, that although the words in sub-s. 2 are "he may if he thinks fit" make a further report, it is his duty, if he thinks circumstances require it, to make such report. It is a statutory duty which is imposed upon him. Having made this further report, the Court, on consideration of the report, may direct the person named in the report to attend to be publicly examined. Now it has been decided by the House of Lords in *Ex parte Barnes* (1) that there is no power to direct a person to attend to be examined unless the official receiver has pledged himself to this extent, that he must say "In my opinion I think that A. B. and C. D., who are directors and officers of the company, have been guilty of fraud in the promotion of the company"; then the Court may make an order requiring the directors to attend. The official receiver's duties are not then over. There is a positive obligation upon him from which he cannot escape. Sub-s. 4 provides: "The official receiver shall take part in the examination, and for that purpose may, if specially authorized by the Board of Trade in that behalf, employ a solicitor with or without counsel." Again there is no discretion in the matter; he is merely a public official discharging public duties for the public welfare. The liquidator may attend, but he need not attend, and so may a creditor or contributory. The person who is examined is sworn. The person examined is required at his own cost before his examination, if he wants to procure the official receiver's report, to pay for it. He may at his own cost employ a solicitor with or without counsel, and then comes this proviso: "Provided always that if such person is, in the opinion of the Court, exculpated from any charges made or suggested against him, the Court may allow him such costs as the Court in its discretion may

(1) [1896] A. C. 146.

think fit"; and a further part of that same section (sub-s. 9) provides that the public examination may, if the Court so directs, and subject to the general rules, be held before any judge of a county court or various other officials, and it says that the powers of the Court under the previous sub-ss. 6, 7, and 8, some of which I have read, may, except as to costs, be exercised by the person before whom the examination is held.

Now it is necessary that I should state very briefly what has happened in this case. [Having stated the history of the case down to the order of the county court judge as to costs, the Master of the Rolls continued:—]

The Divisional Court took a different view. They took the view that the official receiver was not a person against whom there was any jurisdiction to make an order such as was made by the county court judge at Newcastle. From that order Mr. Easten appeals to this Court; and it seems to me, for the reasons which I will state in a moment, that on one point and on one point only—a point which was not taken in the Court below—the appellant is right; but on the principal part of the case the appellant is wrong.

I am unable to read s. 8 and the duties which are imposed upon the official receiver thereby without being impressed with the fact that the official receiver is merely discharging a statutory duty of a judicial or a semi-judicial character when carrying that section into effect, and that the present case falls within the well-settled principle that a person in that position is not liable to an action for damages, and is not liable, even though he may have been negligent in the discharge of those duties, unless there is something also to be found either in his subsequent conduct or proceedings or in the statute itself; unless that can be found, there is no ground for making him liable in any way. But then it is said—and this is really the main difficulty in the case—True it may be that but for the proviso the innocent director might have no right to claim costs against anybody; but here you do find that this proviso says that, with regard to such a person who is in the opinion of the Court exculpated from any charges made or suggested against him, "the Court may allow him such costs as the Court in its discretion may think fit."

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Mr. Gore-Browne very properly and very forcibly attaches great importance to the judgment of Lord Herschell in *Ex parte Barnes* (1), particularly to that passage in which he points out that the provisions of the section would operate very harshly unless you found in it a provision that a man when exculpated should be allowed to have his costs. (2) But that phrase "should be allowed to have his costs" is, it seems to me, a very peculiar wording indeed if it were intended to impose a personal liability upon an officer of the Court—not a litigant, but an officer of the Court—who was merely discharging a duty as to which he has no option and no discretion, whereas they are apt words if the only effect of the proviso is to say that the Court in whose custody and control the assets and the affairs of the company are may, if it thinks fit, out of the assets in its hands "allow" him such costs as the Court in its discretion thinks fit. It really seems to me that if that be the true meaning and effect of the section you do not infringe upon the principle, to which I attach very great importance, namely, the absolute freedom from liability of persons in a judicial or semi-judicial character against whom no complaint is made; and at the same time you do give the innocent director, not, I agree, complete indemnity, because in this case as in many others there are no assets of the company out of which he could get his indemnity; but where there are assets he would get an indemnity, and Parliament has thought fit to enable, not the person who has conducted the examination and has heard what the implicated director said, but the final Court which has charge of the winding-up, to say if any allowances should be made to the innocent director in respect of the costs.

I think, therefore, that there was no jurisdiction to order the official receiver to pay the costs of and incidental to the attendance at the public examination. Still less was there any jurisdiction to order the liquidator personally to pay those costs, because the liquidator was, so far as appears, innocent in the matter. He did not appear separately as liquidator at all in the matter. I therefore do not think it would be right to order him personally to pay costs.

(1) [1896] A. C. 146. (2) Ibid. at p. 155.

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But then comes another point, much less important in the public interest, because the application is very rare. Here Mr. Easten applied to the Court for a declaration that he was exculpated, and he served that notice of motion upon the official receiver, who was also the liquidator. Speaking for myself, I think that there was no ground whatever for serving the official receiver with any such notice of motion as that. In the present case it is a little complicated by the same person being the official receiver and the liquidator, but if, as might very well be the case, the official receiver had been one person and the liquidator had been another, I can see no justification for serving the official receiver, a mere officer of the Court discharging certain duties, with any such notice of motion. There is no duty imposed upon the official receiver to take any subsequent proceedings by way of defending his right or otherwise. He has discharged his duty when he has obtained the order for an examination and has conducted the examination. The Court, if it thinks fit, may desire that notice of an application for exculpation should be served upon him; but it is a very different thing to say that the applicant, the innocent director, is entitled to bring the official receiver before the Court and ask definitely for costs against him. Unfortunately here, the official receiver, who is also the liquidator, took (no doubt in perfectly good faith) a view which seems to me irregular, and in that sense improper. He accepted the position of a litigant. He appeared on the hearing of this application; he argued against the application; he tried to persuade the county court judge that Mr. Easten was not entitled to be exculpated, and having taken up that position in a matter in which he was served and in which he did not allege to the county court judge that he ought not to have been there at all, it seems to me the case is one in which he appears as respondent to a proceeding in the Court in which he argues against the application, and argues unsuccessfully, and in the view of the learned judge wrongly. That being so, I see no reason to doubt that the learned county court judge had jurisdiction to order him to pay the costs of the application for exculpation; and certainly if he had jurisdiction to make the order, as I think he had, it is not a

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matter for appeal or one in which we should in any way interfere.

I think, therefore, the appeal ought to be allowed to the extent only of the costs of the application for exculpation. With that exception I think the appellant must bear them.

FARWELL L.J. I am of the same opinion. With regard to the main point I think there is no jurisdiction to order the official receiver personally to pay a person examined his costs of the inquiry under s. 8. The appointment of an official receiver was a novel office created by the Act of 1890, and in considering the Act one sees that he was intended to act in lieu of the liquidator to some extent, in fact to a very large extent, but also, in addition to performing the duties of liquidator, to act as official receiver in a different capacity under s. 8. Now if and so far as he acts in the position of liquidator, and except so far as the rules (for instance, rr. 81 and 114) make express exception, I see no reason why he should not be liable to the ordinary rules which affect the liquidator in respect of costs of applications made in the capacity of liquidator, although they may be made by him in his name of official receiver.

But when one comes to consider s. 8 of the Act of 1890 different considerations arise. Channell J. has held in the case of *Bottomley* v. *Brougham* (1) that the official receiver is acting in a judicial capacity in making his report and his further report and in conducting the examination under that further report, and his view has been adopted and affirmed by the Court of Appeal in *Burr* v. *Smith*. (2) It appears to me to follow that the official receiver is acting in a capacity which renders it impossible for any Court to visit him with costs any more than it could visit the judge himself who makes the order. The duty is cast on the official receiver first of making his report and stating whether in his opinion further inquiry is desirable; next that he may also, if he thinks fit,—and it has already been pointed out that if he thinks fit then it becomes his duty to do it,—make a further report stating that in his opinion fraud has been committed by a director, promoter, or

(1) [1908] 1 K. B. 584. (2) [1909] 2 K. B. 306.

officer of the company, naming the person whom he considers implicated.

Now those are functions of a judicial character which are cast upon him, not in the liquidation of the company for the benefit of the assets, but primarily at any rate for the protection of the public. One has to bear in mind that in 1890 there had been various company failures, and it was thought that more drastic legislation was required against directors and promoters and people standing in that position, and I have no doubt that this section was passed for that purpose.

It is said, and with some truth, perhaps, that it is a little hard on the company if the view that we take is correct that the costs of all this should come out of the company's assets; but a company only exists by favour of and on the conditions imposed by the Legislature, and it is not immaterial to observe that as long ago as 1862, under the 167th section of the Act of 1862, if directors were prosecuted (as mentioned in that section) the expense of the prosecution came out of the assets of the company.

Further, it is said it is hard in that there may be no assets; but, on the other hand, one has to remember that the Court does not usually make orders unless there is something to wind up, though it undoubtedly has jurisdiction to make such an order even when there are no assets—a jurisdiction which has been acted upon more than once in order to lay the foundation for this very inquiry in the public interest.

I think, therefore, that the Solicitor-General was right in the distinction that he drew between duties which are duties of a liquidator for the purpose of getting in assets, dividing them and paying the debts, being the duties of the liquidator proper, and the duties cast upon the official receiver for the first time by this section, which are duties in the interests of the public rather than in the interests of the company.

That being so, it appears to me to follow that the Court can no more make the official receiver who has acted in this way liable for the costs of proceedings so taken by him under the direction of the Act than the Court can make the judge himself

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who under sub-s. 3 directs that the inquiry shall take place, or under sub-s. 6 puts questions to the person examined as he may think fit.

Channell J. has already likened the case of the official receiver to that of the official referee when under an order of the Court he is called upon to inquire and report. It is very much the same thing; I cannot see on what ground it can be suggested that the official referee could be liable for the costs of anything he did in that judicial capacity, and I think the official receiver stands in the same position.

Then it is said there is a proviso here that if the person is exculpated the Court may allow him such costs as the Court in its discretion may think fit. Now "allow" is a very apt word when you are dealing with a person to receive costs out of the estate or to receive something from a person who is prima facie liable to pay. In the present case it is reasonably clear to my mind that "allow" means allow out of the estate. I think so for the reasons suggested by my brother Kennedy in the course of the argument, that s. 8 contains the curious exception that the person who conducts the examination may exercise all the powers in sub-ss. 6, 7, and 8, but not the power as to costs in sub-s. 9. Now that appears to me to point to this. The costs are to come out of the estate and not to be treated as inter partes. If they are to be treated as inter partes the man who hears the case, that is to say, the man who conducts the examination, would be naturally the proper person to determine the incidence of those costs. If they are to come out of the estate, then they are properly referred to the judge who has the administration of the estate. To my mind that exception is very strong to shew that "allow" means allow out of the estate. But further the proviso refers to the recipient of the costs, not to the person to pay the costs. When a person who is not really a litigant at all, but who occupies such a position as I have already described, is the only person who can be attacked, it appears to me impossible to say that the Legislature, in using such words as "the Court may allow" the person exculpated "such costs" as it "may think fit," meant thereby to say the Court may order the official receiver

who has conducted this examination which this Act put upon him personally to pay those costs.

That disposes of the first point. With regard to the second I agree with the Master of the Rolls that the official receiver need not be served at all if he happens to be a person different from the liquidator. But in the present case the same gentleman is both official receiver and liquidator. It was not necessary in serving him to state to him whether he was served as liquidator or official receiver. He was required to appear personally, and as liquidator it was in my opinion proper that he should be served, and right that he should appear, because costs were asked for, and the liquidator no doubt has to defend his estate and is entitled to defend himself if costs are asked in such a way as, there being no estate, he knows they must fall upon him personally. But when he does appear the judge is entitled to treat him as a litigant, and I am unable to see how this Court can interfere with the learned county court judge's order directing the liquidator to pay costs of the appearance in Court on the application for exculpation.

Speaking for myself, I find it difficult to agree with the decision of the Divisional Court in *In re Raynes Park Golf Club* (1), where they appear to have held on an application, purely of administration, that the liquidator as such, and not in a quasi-judicial function of official receiver, had a right to appeal when ordered to pay costs although no misconduct was proved. I think it was in the discretion of the judge and therefore not appealable.

I therefore agree with the decision of the Master of the Rolls.

KENNEDY L.J. I am of the same opinion. In the judgments now under appeal Darling J. held that there was no discretion which had been properly exercised, and he also held, as I understand his judgment, that there was no jurisdiction in the learned county court judge to make the order which he did make. Bucknill J. expressly says at the close of his judgment that he desires to express no decision on the ground of jurisdiction, but concurs in the judgment that had just been pronounced by

(1) [1899] 1 Q. B. 961.

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Darling J. on the ground that as a matter of discretion the order under appeal ought not to have been made.

I think myself that if I could come to the conclusion that there was a discretion in the learned county court judge that he might or might not—of course acting with a judicial mind—order the official receiver to pay these costs, I should have felt very great difficulty in interfering with the decision so far as it refers to the proceedings in the examination. But I have come to the conclusion, as the Master of the Rolls and Farwell L.J. have done, that the better view is that there was really no power in the learned county court judge to make an order for the payment of these costs personally by the official receiver.

I am not going over the ground over which my brethren have travelled in their judgments. I am satisfied that the official receiver's position is a position so far judicial that, as in the case of the actions for libel which were brought to our notice by the Solicitor-General, the official receiver is to be treated in regard to the proceedings under these sections of the Act of 1890 and the corresponding sections of the existing Act of 1908 as an officer of the Court doing his duty. It is his duty to make the report if he thinks there is ground for it. He is charged by statute with the duty of attending this examination when, in consequence of his report, the Court orders that certain persons implicated in that report in charges of fraud shall be examined. The one difficulty is that which must have presented itself to everybody who has heard the argument. It does seem hard that a person should be charged with fraud by a judicial officer and should be thereupon examined by order of the Court, and not even have the expense of going to the place of examination allowed him, and, even if it turns out that the charges are entirely baseless, that he should have nobody from whom he could get any kind of compensation, except from the company which is in liquidation, and to which in many cases, as it is in the present, it is useless to apply, because they have got no funds out of which to pay. When the statute says this, "Provided always that if such person is, in the opinion of the Court, exculpated from any charges made or suggested against him, the Court may allow him such costs as

the Court in its discretion may think fit," one naturally does seek if possible to find a chance of payment other than a probably poor company whose assets will not meet the order of the Court if made. On the other hand, the word "allow," as has already been said, is certainly not the word one would expect to find if it was meant to signify a right on the part of the Court to award costs against some other party. It is not the natural word that we should expect to find in the context. There is the argument, I agree, on the other hand, which was put by Mr. Gore-Browne, and which has its own weight, but which I do not think is sufficiently weighty to counterbalance the consideration which I have just mentioned on the word "allow," and that is the argument that it would have been extremely easy, and it would have solved all difficulties, for the Legislature to have said "may allow him out of the assets of the company or the funds available in the hands of the liquidator of the company if sufficient." The word "allow" is not apt if it means that the Court shall give him costs, to be paid by some other person treated as a litigant. All one can say is that under those circumstances the character of the official receiver in his conduct of these proceedings is so far judicial, so far the function of a public officer entrusted with a duty which he is bound to perform, that the generality of the words and the possible hardship upon the man who is examined and is exculpated are considerations not sufficient to outweigh this.

That being so, it does not seem to me that there was any discretion in the county court judge to make an order personally against the official receiver in respect of the costs of that examination. It is upon that ground that I am prepared to affirm the result of the decision which was arrived at in the Court below.

Then one comes to the further matter, the costs of the motion and application before the learned county court judge. It is very secondary as a matter of public interest; whether it may not be equally important to the present appellant pecuniarily I am, of course, wholly unable to say, not knowing what the respective costs are; and I do not desire to add to what has been already said except this, that if the person who has been examined

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seeks by motion for a declaration of exculpation, it would be always prudent and right for him to give notice to the official receiver, leaving him to appear or not on that application for exculpation. I agree that it may be right not to make him formally a party to the application, and to claim costs against him, but I can hardly myself conceive the learned county court judge coming to the serious conclusion of exculpating on evidence which possibly he has not himself heard without insisting upon hearing what, if anything, the official receiver wished to say. Here the official receiver, at any rate, chose, as has been pointed out, to take an active part as a litigant, to dispute the propriety of exculpation, and has rightly been made, I think, by the learned judge responsible for the costs of the application. Clearly the liquidator, whether the same person is liquidator and receiver or whether there is a separate liquidator, must have notice of the application, because, on the view which we are taking, the fund out of which the judge may allow such costs as in his discretion he may think fit is the fund of the company which for the time being is represented by the liquidator.

In my opinion this appeal to some extent deserves to succeed, and no doubt from the public point of view it is very important that the appeal should have been brought.

COZENS-HARDY M.R. I wish just to add that of course a county court judge or a judge having the conduct of the winding-up can always require the official receiver to appear if he wants to put any question to him.

Appeal dismissed as to the costs of the examination and allowed as to the costs of the application for exculpation.

Solicitors: *Worthington Evans, Dauney & Co., for Mather & Dickinson, Newcastle-upon-Tyne; Solicitor to the Board of Trade.*

W. C. D.

[IN THE COURT OF APPEAL.]

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June 7, 8.

In re R. W. STEAD, A SOLICITOR.

[See note at end of case.]

Practice—Costs—Taxation — Non-contentious Business —Jurisdiction—Proper Officer—District Registrar of Manchester—Solicitors Act, 1843 (6 & 7 *Vict.* c. 73), *s.* 37—*Rules of the Supreme Court, Order* XXXV., *r.* 6A; *Order* LXI., *r.* 1B; *Order* LXV., *r.* 26A; *Order* LXXI., *r.* 1.

Application having been made by originating summons in the Manchester District Registry for an order referring the bill of costs of a solicitor for non-contentious business to the district registrar for taxation:—

Held, that although an originating summons was the proper form in which to make the application and a judge of the King's Bench Division had power to refer the bill for taxation, yet the district registrar was not the "proper officer" to whom a bill for non-contentious business could be referred for taxation within s. 37 of the Solicitors Act, 1843, and that the bill must be taxed by a Master of the Supreme Court.

APPEAL from a decision of Walton J. sitting as judge in chambers at Manchester.

In 1886 Richard William Stead, a solicitor practising in Manchester, married a lady who was entitled to considerable property in Salford and the neighbourhood, in the realization of which she took proceedings in the Lancashire Chancery Court. About this time Mr. R. W. Stead retired from general practice, although he continued to take out a certificate. Subsequently Mr. and Mrs. Stead were living at Eastbourne, and in May, 1897, Mrs. Stead died there, having by her will appointed R. W. Stead, L. D. L. Ellis, N. Smith, and A. J. Stead to be her executors and trustees, and declared that any executor or trustee being a solicitor who transacted business for her estate should be entitled to be paid his professional and other charges for so doing. The will was proved by R. W. Stead; and from that time all the administrative work in connection with the trusts of the will was carried out by him. In 1900 L. D. L. Ellis retired from the trusteeship. In 1903 R. W. Stead was taken ill, and from that time the work in connection with the trust was done by A. J. Stead, who was a solicitor practising in Manchester and a nephew

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of R. W. Stead, although not connected with him in business. R. W. Stead died in 1907, leaving A. J. Stead and another his executors, and all the papers referring to the trust were thereupon removed from Eastbourne to Manchester. In 1909 A. J. Stead delivered to his co-trustee under Mrs. Stead's will, N. Smith, bills for costs due by the trust to R. W. Stead for non-contentious work done by him down to the date of his death, and due to himself till August, 1909. In January, 1910, two originating summonses were issued in the Manchester District Registry, one by R. W. Stead's executors and the other by A. J. Stead, asking that the bills should be referred to the district registrar to be taxed. N. Smith and some of the beneficiaries under the will of Mrs. Stead opposed the application and asked that the taxation should proceed in London on the ground of the convenience of the parties. Both summonses were referred to the judge, who dismissed them with costs. The plaintiffs in both cases appealed, and the appeal in R. W. Stead's case was heard first.

M. Lush, K.C., and *Gordon Hewart*, for the appellant. There are special rules relating to the Liverpool and Manchester District Registries, namely, Rules of the Supreme Court, Order XXXV., rr. 4, 5, 6, and 6A, which place the registrars of those districts in a different position to other district registrars. Under Order XXXV., r. 6A, the district registrar is made the taxing Master for all matters proceeding in that registry, and under these and other rules to be referred to the district registrar is now the "proper officer" within the meaning of s. 37 of the Solicitors Act, 1843, to whom these bills should be referred for taxation. Walton J. was misled by *In re Porrett* (1); that case is now superseded by Order LXV., r. 26A, which provides for orders for taxation of bills relating to non-contentious proceedings.

An originating summons for an order for taxation can under Order LIV., rr. 4B, 4C, 4F (1.), and Order LV., r. 2 (15.), now be issued out of the district registry. In the King's Bench Division an originating summons is the means of obtaining an order for taxation. The judges of the King's Bench Division have

(1) [1891] 2 Ch. 433.

jurisdiction to order delivery of a bill of costs in non-contentious business; this jurisdiction was conferred on them by the Judicature Act, 1873, s. 16: *In re Pollard.* (1)

[FARWELL L.J. Surely the proper way of getting taxation is by the usual order of course obtained in the Chancery Division: if so, how can an application by originating summons be justified?]

There are now two ways of getting taxation, bypetition of course in the Chancery Division, and by originating summons in the King's Bench Division. Both are now equally proper. Order LXI., r. 1B, establishes one department for both Divisions of the High Court. Under Order LXV., r. 26A, orders for taxation of non-contentious bills may now be made by the Court or a judge of any Division, and this rule renders *In re Pollard* (1) obsolete. This is stated to be the result in Scott's Guide to Costs, 11th ed., p. 1168, and in the note to r. 26A in the Annual Practice. The only way of approaching a judge of the King's Bench Division is by originating summons. Appendix K to the Rules of the Supreme Court, 1883, No. 1G, gives a form of summons for taxation.

The "proper officer" is defined by Order LXXI., r. 1, and there "taxing Master" includes the person whose duty it is to tax in any Division or department of the Supreme Court, which includes a district registry. In Liverpool and Manchester it was intended that the district registrar should deal with all originating summonses, including a summons for taxation, and on a summons being issued there is a matter or proceeding pending, and the registrar is the proper person to tax. [*In re Holloway* (2) was also cited.]

Hemmerde, K.C., and *L. Mossop*, for the respondent. There is no jurisdiction to send anything to the district registrar for taxation that is not strictly a matter "proceeding" or "pending" in the district registry. It is not possible to create a "proceeding" that will give jurisdiction by issuing a summons for taxation. This is clear from *In re Porrett.* (3) The observations of Kay L.J. at p. 448 on originating petitions apply equally to

(1) (1888) 20 Q. B. D. 656. (2) [1894] 2 Q. B. 163.
(3) [1891] 2 Ch. 433.

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an originating summons for taxation. In non-contentious business the district registrar is not the "proper officer" under s. 37 of the Act of 1843, and there is nothing in the Rules to shew that he is. If the appellant's contention is right there is nothing to prevent any one obtaining taxation in Liverpool or Manchester simply by taking out an originating summons in one of those district registries.

M. Lush, K.C., in reply. There are three steps in practice which give to the district registrar the power of dealing with taxation in non-contentious matters. (1.) Rules of the Supreme Court, Order LXV., r. 26A, gives a judge of the King's Bench Division power to deal with costs in non-contentious matters. (2.) The proper way in which to apply to the judge is by originating summons: Order LIV., r. 1. A petition has never been used for this purpose on the common law side. (3.) The registrar of the Manchester district has power to issue the summons. Order XXXV., r. 6A, recognizes him as a taxing Master.

[COZENS-HARDY M.R. Originally the Chancery taxing Masters were the only persons who could have taxed this bill. They were transferred to the Central Office by Order LXI., r. 1B, and there is nothing which gives district registrars similar powers.]

"Taxing officer" in the Supreme Court Funds Rules, 1905, is defined by r. 3 to include "in matters originating in the district registry of Manchester or Liverpool the district registrar." This is a matter which originated in Manchester. So the district registrar is the proper officer to tax this bill. The definition is not confined to actions. By Rules of the Supreme Court, Order LXXI., r. 1, "taxing officer" includes Masters of the Supreme Court for the time being acting as taxing Masters or other persons whose duty it is to tax costs in any department of the Supreme Court. By Order LIV., r. 9A, one official can dispose of business for another. The district registrar of Manchester has all the powers of a Master, and he could have made the order for taxation himself.

COZENS-HARDY M.R. This is an appeal from an order of Walton J. refusing to direct taxation before the Liverpool district registrar of a bill of costs for non-contentious business, and

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the question, which is one of very considerable difficulty, depends upon the true meaning and effect of certain Rules of Court which are strangely worded, not altogether consistent, and with more than one hiatus, if I may use that phrase.

Now the jurisdiction to tax this bill is created by the Act of 1843, s. 37. That section provides, and this is common ground, that under it this particular bill could at that time and for many years afterwards only have been taxed by means of a petition at the Rolls, and the only proper taxing Master was one of the taxing Masters of the Court of Chancery. In Chancery there were two perfectly well known orders for the taxation of bills of a non-contentions kind, such as this. There was the order of course which was obtained without serving anybody. You got it as a matter of course upon an application to the secretary of the Master of the Rolls. There was also a special order which had to be obtained on notice to the other side; and, on bringing it before the Master of the Rolls himself in Court, if there were any special circumstances which rendered an order of course inappropriate, and if the order of course had been wrongly made, it was discharged with costs, and then the party had to begin again. But in nine out of ten, probably ninety-nine out of one hundred, taxations the order was obtained as an absolute matter of course, ex parte, under what was perfectly well known as, and what is recognized in the Rules of Court now in force as being, a well-known thing, an order of course. Then came the Judicature Act, 1873, and there was a discussion whether the effect of the Judicature Act and the Rules under it was to vest in the judges of the High Court that jurisdiction which originally had been confined to the Master of the Rolls and the Lord Chancellor. Although there was a difference of opinion in the Court of Appeal on that point, Lord Esher being apparently desirous of retaining this privilege annexed to the office which he then held with so much distinction, the majority of the Court held, and I see no possible reason to doubt the correctness of the decision, that the jurisdiction was conferred upon all the judges of the Chancery Division. Then Rules of Court were made, to some of which I must refer, premising this, that such a thing as a petition under which an order might be made, whether an

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order of course or not, was a creature of the Chancery Division, and wholly unknown in the King's Bench Division. Taxation of costs was business which was assigned to the Chancery Division by the Act, but a Rule of Court was made, Order LXV., r. 26A, which in plain terms gave jurisdiction in this matter to any judge of any Division. It says: "Orders for delivery of bills of costs by solicitors and for taxation of such bills"—that means bills of costs by solicitors—"may be made by the Court or a judge in any Division of the High Court, notwithstanding that such bills relate to non-contentious proceedings." I therefore feel no doubt that Walton J. had perfect jurisdiction to make the order for taxation of this bill of costs, and to make it on an application by the only means known in the King's Bench Division, namely, by means of an originating summons; and to make it on an originating summons issued in the Manchester District Registry, because under the rules referring to Liverpool and Manchester and making them exceptions from the general class of district registries, those district registries could issue an originating summons. But that does not really touch the question which arises under s. 37 of the Solicitors Act, 1843. The bill under that section has to be taxed by the proper officer of the Court, and in my view this whole appeal really involves only this point: Is the district registrar at Manchester the proper officer of the Court in which the reference is made to tax a bill for non-contentious business? I have come to the conclusion that he is not. I would first of all refer to Rules of the Supreme Court, Order LXI., r. 1B, which shews that the Masters of the Supreme Court (Taxing Office) are expressly empowered to tax and settle all costs directed by any statute to be taxed or settled by a Master of the Supreme Court or by any Master as the prescribed authority for any such taxation. Those words seem to me strictly applicable to the case of non-contentious costs which were originally directed to be taxed by the Master of the Court of Chancery. What then is the position of the district registrar at Manchester? It is very peculiar. Under Rules of the Supreme Court, Order XXXV., r. 6A, the district registrar is made a taxing officer in a Chancery matter proceeding in the Manchester

District Registry whether the order is interlocutory or final; but when you come to a King's Bench action in the Manchester District Registry I can find no authority conferred upon the district registrar to tax except such as is contained in r. 4 of Order xxxv., and that authority is given only when final judgment is entered in the district registry. When I find in the Rules all these things expressed, that you may tax in a King's Bench action, but only after final judgment, that you may tax in a Chancery matter on an interlocutory judgment of any kind, and when I find no express direction whatever making the district registrar the proper officer of the Court in non-contentious business, I do not feel myself at liberty to say that the district registrar at Manchester is an officer to whom Walton J. could direct this taxation on the footing that he was the proper officer of the Court in which the reference is made for such purpose. I do not know that much advantage would be gained by my going again through the various Rules and Orders which have been put before us with great care and, so far as the circumstances admitted, with great clearness by counsel in this case, but I have come to the conclusion that we cannot differ from Walton J., and that the only place where these costs can be taxed under his order is in the taxing office of the Supreme Court.

For these reasons I think this appeal must be dismissed.

FARWELL L.J. I have come to the same conclusion. I agree that the real question is, who is the proper officer of the Court in which such reference shall be made within the meaning of s. 37 of the Solicitors Act, 1843? This is non-contentious business; it could only have been sent by a Chancery judge to the Chancery taxing Masters prior to the Rules of the Supreme Court, Order LXV., r. 26A. Now common law judges are entitled to make the order. If I may say so with great respect, it is a pity that that rule was not enlarged a little, and that some consideration was not given to the result that, apparently, petitions of course have no application if the order is made by a judge of the Common Law Division. Inasmuch as that omission leads to expense, it is a pity that some provision

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was not made, and it might well now be made, to enable a judge in the Common Law Division to deal with petitions of course or to allow petitions of course to take effect as though they had been issued in the Chancery Division. However, that is not the point we are concerned with, which is simply this: Is the district registrar in Manchester or Liverpool the proper officer of the Court? To my mind he cannot be so, unless we can find within the Rules something which gives him the jurisdiction, and that cannot be found except in a cause or matter pending either in common law or in Chancery. It is said that the district registrar has power to issue an originating summons; that an originating summons is the only mode in which taxation can be obtained from a common law judge; that this summons for taxation is a matter pending; and therefore the district registrar can tax. In my opinion that is a fallacy which was disposed of by Kay L.J.'s judgment in *In re Porrett.* (1) The necessary pending matter cannot be created by issuing a summons and saying that the condition precedent for ordering the taxation is performed by taking out the summons; the matter must be pending before the summons can be taken out. The proper officer, therefore, is not the district registrar, but those persons who are pointed out in the note to the Rules of the Supreme Court, Order LXI., r. 1B, at p. 972 of the Annual Practice.

For these reasons I agree that the appeal should be dismissed.

KENNEDY L.J. I feel myself obliged to come to the same conclusion upon the consideration of the statute of 1843 and the Rules of the Supreme Court. It appears to me that, so far as regards the issue of the originating summons in order to get the judgment of Walton J. under Order LXV., r. 26A, the procedure was perfectly right and unimpeachable. Speaking for myself, I do not think that now, since the passing of the Rules of the Supreme Court, Order LXV., r. 26A, the judgment in *In re Porrett* (2) affects this case. But then comes this difficulty. The originating summons being proper for the purpose of obtaining the judge's order, and the judge having power to

(1) [1891] 2 Ch. 433, 448. (2) [1891] 2 Ch. 433.

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make the order for the delivery and taxation of a bill of costs, in this case of a bill relating to non-contentious proceedings, to whom can the judge of the King's Bench Division properly give the direction to tax? That is answered, as the Master of the Rolls has pointed out, by referring to the Act of 1843, which speaks of the proper officer of this Court for the purpose. The proper officer of this Court must be a person whom we can find somewhere in the Rules invested with the power of taxing in non-contentious business; and in spite of the very able and interesting arguments which we have heard, which no doubt have brought out every possible point in favour of the appellant's contention, I am unable to find authority for holding that the district registrar at Liverpool or Manchester has been made the proper officer for taxing in non-contentious business under an order of a judge of the King's Bench Division. I cannot help, in a sense, regretting that that is so. Subject always to some question of special convenience, if matters of a non-contentious character are conducted in the district, it seems to me that from the powers that these registrars have in contentious business, and the experience which they have in taxation, there is no reason why they should not be permitted to do, in non-contentious business, that which the Legislature has thought it right to say they can do when judgment has been obtained, in the absence of an order to the contrary. But that is a view which means, if it is right, that the Rules of the High Court ought to be altered for that purpose. (1)

Appeal dismissed.

Solicitors: *C. P. Fielder, Le Riche & Co., for A. J. Stead, Manchester; F. M. Jeboult.*

(1) NOTE.—By Order XXXV., r. 6a, as amended by R. S. C., July, 1910, where a summons is issued in either the district registry of Liverpool or in the district registry of Manchester for taxation of costs of a solicitor under statute or otherwise the district registrar shall act as registrar and taxing Master of the Supreme Court.

H. C. R.

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Jan. 13.

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Justices—Practice—Hearing of Information—Advocacy by Police Officer—Absence of Informant—Offer of Justices to adjourn—Refusal of Offer—Waiver of Irregularity—Objection to Conviction—Summary Jurisdiction Act, 1848 (11 & 12 *Vict. c.* 43), *s.* 13.

An information was preferred by the respondent against the appellant under s. 1, sub-s. 1, of the Motor Car Act, 1903, for driving a motor car at a speed which was dangerous to the public having regard to all the circumstances of the case. The appellant appeared before the justices with his solicitor at the hearing of the information, but the respondent was not present either personally or by counsel or solicitor.

A police officer, who was one of the witnesses for the prosecution, examined the other witnesses for the prosecution, and during the course of the case the appellant's solicitor requested the justices' clerk to make a note of the police officer's name. The justices thereupon announced that the case was adjourned. The appellant's solicitor, however, said that he preferred that the case should proceed. Accordingly the hearing proceeded and the appellant was convicted:—

Held, that the offer to adjourn having been declined by the appellant's solicitor, neither the absence of the respondent nor the fact that the police officer, although a witness, conducted the examination of the other witnesses for the prosecution invalidated the conviction.

Case stated by justices for the county of Chester.

An information was preferred by the respondent, John Beeley, superintendent of police, against the appellant, Rupert May, under s. 1, sub-s. 1, of the Motor Car Act, 1903 (3 Edw. 7, c. 36), charging the appellant with having on July 12, 1909, at the township of Beeston, in the county of Chester, on a public highway named Whitchurch Road, unlawfully driven a motor car at a speed which was dangerous to the public having regard to all the circumstances of the case.

At the hearing before the justices the appellant was present together with his solicitor. The respondent was not present, as he was away on leave, and was not represented by counsel or solicitor.

The witnesses for the prosecution were called in support of the charge, and were examined by a police sergeant, who was also one of the witnesses in the case, the chief constable of the county of Chester being present during part of the hearing, and the police sergeant acting under his directions.

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At the close of the evidence of the ninth witness who had given evidence on behalf of the respondent, the solicitor for the appellant inquired the name of the police officer who was conducting the case, and having been informed that it was Police Sergeant Arthur Phillips, he requested the justices' clerk to make a note of the fact, which he did.

After the request the justices consulted together on the bench, and the chairman, as a result of the consultation, announced to the Court that the case was adjourned. The solicitor then said, "I do not wish to be opposed to the wishes of the Court, I prefer the case to go on rather than put my client to the trouble and expense of coming here again," and the hearing accordingly proceeded, and Police Sergeant Arthur Phillips, the tenth and last witness called on behalf of the respondent, then went into the box and gave evidence.

The respondent was not a witness in the case.

The appellant's solicitor subsequently addressed the Court on behalf of the appellant, without making any reference to the absence of the respondent and without drawing the attention of the Court to the law on the subject, or making any objection to the hearing of the information in the respondent's absence. The appellant and his witnesses were then sworn and gave evidence on behalf of the appellant.

The justices convicted the appellant.

The questions for the opinion of the Court were, first, whether the determination of the justices was erroneous in point of law and in excess of their jurisdiction by reason of the fact that the respondent was not present nor represented by counsel or solicitor at the hearing of the information, and whether it was only competent for the justices to dismiss the information or adjourn the hearing thereof, having regard to the fact that the information was laid by the respondent as superintendent of police under the written instructions of his superior officer, the chief constable for the county. Secondly, whether, inasmuch as both parties were not present, the hearing of the information was a hearing on the merits, or such a hearing as would enable the High Court finally to reverse the conviction without sending the case back to the justices for rehearing with

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the respondent present by himself, his counsel or solicitor. Thirdly, whether the conviction was valid having regard to the fact that notwithstanding the absence of the respondent the appellant's advocate acquiesced in the continued hearing of the information, though the justices, on his asking for a note to be taken as before mentioned, agreed to adjourn the case.

An affidavit had been made on the part of the appellant to the effect that the justices had made a mistake in stating the case, and that the appellant's solicitor had not said he would prefer the case to go on, but that something of the kind had occurred in another case before the same justices on the same day.

The justices had also made an affidavit, four of them stating that they had made no mistake, and two of them not making any statement on the point.

J. B. Matthews, for the appellant. Having regard to the conflict upon the affidavits as to what took place at the hearing before the justices, the case stated should be sent back to them for amendment under s. 7 of the Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43). The justices have made a mistake as to the appellant's solicitor having agreed to go on in the absence of the informant. That happened in another case.

The conviction is open to objection upon two grounds. First, the case for the prosecution was conducted by a person not the informant, nor a solicitor or counsel: *Duncan* v. *Toms*. (1) The objection was sufficiently raised before the justices, but even if it was not, this Court will in a proper case quash a conviction on grounds not taken in the Court below: *London, Edinburgh, and Glasgow Assurance Co.* v. *Partington* (2); *Ex parte Markham*. (3) Police advocacy was disapproved of in *Webb* v. *Catchlove*. (4) The fact that the case was conducted by a person not entitled to conduct it goes to the validity of the conviction. Secondly, as the informant was not present nor represented either by solicitor or counsel, the justices had no jurisdiction to proceed with the hearing, as s. 13 of the Summary Jurisdiction Act, 1848 (5),

(1) (1887) 51 J. P. 631.
(2) (1903) 67 J. P. 255.
(3) (1869) 34 J. P. 150.
(4) (1886) 50 J. P. 795.
(5) The Summary Jurisdiction Act, 1848, s. 13, provides that "if

expressly enacts that in those circumstances they shall dismiss the information or adjourn the hearing. The irregularity in the conduct of the case could not be waived by the appellant. A defendant can only waive an irregularity before justices where the process is irregular, or where there is bias on the part of the justices: *Batt* v. *Mattinson*. (1) The conviction is therefore bad.

R. V. Bankes, for the respondent, was not called on.

LORD ALVERSTONE C.J. The one important point in this case is whether the appellant's solicitor, when an adjournment was offered, said that he would rather go on. It is said that there has been a complete mistake, and that it was in another case that this statement was made. The question is whether we ought to send the case back in order to have this matter further investigated. We have intimated in previous cases that where there is a contest as to what took place in the Court below we must accept the statement of the justices. It appears that six justices were present, four of whom have stated that no mistake of the kind was made, and the other two in no way question that statement. It seems probable that something of the kind was said by the appellant's solicitor, because all parties agree that some question of the kind was raised on that day, which the justices considered. Having regard to the affidavit made by the justices we cannot possibly send the case back.

In my opinion the point as to police advocacy taken by Mr. Matthews on behalf of the appellant is open to him. In more than one case, e.g., in *Knight* v. *Halliwell* (2), the Court has allowed a point which arose on the facts to be argued although it was not raised in the Court below. I quite agree that if the police officer advocate is a witness the expressions of judges disapproving of police advocacy are applicable. But there are cases where there may be no objection to the facts being brought

. . . . such defendant shall attend voluntarily in obedience to the summons in that behalf served upon him . . . . then, if the complainant or informant . . . . do not appear, by himself, his counsel or attorney, the . . . . justices shall dismiss such complaint or information, unless for some reason . . . . they shall think proper to adjourn the hearing . . . ."

(1) (1900) 64 J. P. 615.

(2) (1874) L. R. 9 Q. B. 412.

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before the Court by a policeman. Police advocacy is, however, no objection to a conviction. It is not suggested that any injustice was done to the appellant through the case being conducted by the officer. Therefore we cannot allow the suggestion that the police ought not to appear as advocates to be used as an argument against the validity of the conviction.

With regard to the second point urged against the validity of the conviction, which is based upon the absence of the informant, I will assume that he ought to have been present. It is to be observed that under s. 13 of the Summary Jurisdiction Act, 1848, the justices had power to adjourn the case for his attendance, and if an adjournment had taken place for that purpose he would have attended and stated that he was the informant. In my opinion the appellant's solicitor exercised a wise discretion in not asking for an adjournment, and the offer to adjourn is a conclusive answer to the contention put forward in support of this appeal. There is nothing in the objection that after the justices had offered to adjourn on the ground that the informant was absent they nevertheless proceeded to hear and determine the case when the offer was not accepted. With regard to s. 13 of the Summary Jurisdiction Act, 1848, upon which Mr. Matthews relies, I do not propose to express any opinion as to the meaning of the words "if the complainant . . . . do not appear, by himself, his counsel or attorney." Whatever s. 13 of the Summary Jurisdiction Act, 1848, may mean when it refers to the appearance of the complainant or informant, this objection cannot be taken to the conviction after the offer to adjourn.

BUCKNILL J. I am of the same opinion.

BRAY J. I agree.

Appeal dismissed.

Solicitors for appellant: *Cox & Lafone, for R. A. Clarke, Wellington, Salop.*

Solicitors for respondent: *Philpot, Morrell & Hughes, for Potts, Potts & Gardner, Chester.*

J. E. A.

In re THE ARBITRATION ACT, 1889, AND *In re* AN ARBITRATION BETWEEN AKTIEBOLAGET ROBERTSFORS AND LA SOCIÉTÉ ANONYME DES PAPETERIES DE L'AA.

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Arbitration—Practice—Jurisdiction—Service of Notice of Motion to set aside Award on Foreign Company out of Jurisdiction—Rules of the Supreme Court, 1883, *Order* XI., *r.* 8A.

There is no jurisdiction under Order XI., r. 8A, of the Rules of the Supreme Court, 1883, to grant leave for service out of the jurisdiction of a summons, order, or notice, except in the circumstances in which there is jurisdiction under Order XI., r. 1, to grant leave for service of a writ of summons out of the jurisdiction.

If leave is granted for service in a country to which Order XI., r. 8, applies, the summons, order, or notice must be served in the manner directed by that rule; if in a country to which r. 8 does not apply, the service must take place in the manner directed by the previous rules having reference to the service of notice of a writ of summons.

An award was made against the respondents, a foreign company carrying on business in Sweden, in an arbitration held in England in pursuance of a clause contained in an agreement entered into in France between the respondents and the applicants, a foreign company carrying on business in France. The clause in the agreement under which the arbitration took place provided that in the event of any dispute arising under the agreement the same should be submitted to arbitrators to be appointed by each party, or in case of need to an umpire to be appointed by the arbitrators. The applicants and respondents respectively appointed a Frenchman and an Englishman as arbitrators, and the arbitrators appointed an Englishman as umpire, by whom the award was made in England. Under the agreement the respondents "elected" a French domicil:—

Held, that there was no jurisdiction under Order XI., r. 8A, to grant leave to the respondents for service on the applicants out of the jurisdiction of a notice of motion to set aside the award.

SUMMONS taken out by the applicants, La Société Anonyme des Papeteries de l'Aa, returnable before a judge in chambers, asking that an order made by a Divisional Court on March 17, 1910, granting leave for service out of the jurisdiction of a notice of motion to set aside an award might be set aside on the ground that the Court had no jurisdiction to grant the leave for service of the notice out of the jurisdiction.

On October 15, 1907, the applicants, a foreign company

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carrying on business at Wizernes, in France, purchased from the respondents, Aktiebolaget Robertsfors, a foreign company carrying on business in Sweden, certain quantities of wood pulp through the respondents' agents, Messrs. Bulow & Bennet, of Paris. The contract, which was in writing in the French language, was executed in Paris, and the translation (so far as material) is as follows:—

"Bought of Aktiebolaget Robertsfors . . . . Sold to La Société Anonyme des Papeteries de l'Aa at Wizernes through Bulow & Bennet of Paris the following lot of wood pulp. . . . .

"Election of domicil of seller at the address of Messrs. Bulow & Bennet, Paris. Quality according to the usage of the shipper and on all points in conformity with sample waggon invoiced the 5th August, 1907.

"Approved together with all printed and handwritten conditions.

"*Arbitration.* All disputes shall be settled by arbitration. Each party shall appoint one arbitrator and the arbitrators thus appointed may before taking up their duties appoint a third to act as umpire in case of need; there shall be no appeal against their decision.

"*Domicil.* Every foreign seller shall elect in France a domicil to which all writs and legal communications may be addressed."

Neither the applicants nor the respondents carried on business in this country within the jurisdiction.

Upon delivery being made exception was taken by the applicants to certain of the goods which they claimed were not in accordance with sample. The matter was thereupon referred to arbitration according to the terms of the contract, and a submission note was made and signed in France on behalf of the applicants and respondents respectively. Mr. Erikson, of London, was appointed arbitrator on behalf of the respondents, and Monsieur Buchart, of Calais, was appointed arbitrator on behalf of the applicants. Mr. Mears, of London, was appointed by the arbitrators to act as umpire, and he made his award dated October 30, 1909.

On March 17, 1910, the respondents obtained upon ex parte

motion to the Divisional Court leave to serve the applicants in France with notice of motion to set aside the award. The grounds upon which the respondents based the proceedings to set aside the award were that it exceeded the submission and that the umpire proceeded to hear the case and to make his award without giving the respondents any opportunity of adducing evidence or dealing with the points made by the applicants and received evidence from the applicants without communicating the fact to the respondents.

The notice of motion was upon its face addressed to the applicants, "of Wizernes, Calais, France." On May 11, 1910, the applicants took out the summons to set aside the leave granted on March 17, 1910. The summons, which was returnable before Bucknill J., was referred by him to the Divisional Court.

McCardie, for the applicants. The Divisional Court had no jurisdiction to grant leave to serve the notice to set aside the award out of the jurisdiction. Order XI., r. 8A, of the Rules of the Supreme Court, 1883 (1), was made in consequence of the

(1) Rules of the Supreme Court, 1883:—

Order XI., r. 1: "Service out of the jurisdiction of a writ of summons may be allowed by the Court or a judge whenever— . . . .

"(*c*) Any relief is sought against any person domiciled or ordinarily resident within the jurisdiction; or . . . .

"(*e*) The action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland; . . ."

Rule 8: "Where leave is given to serve notice of a writ of summons in any foreign country to which this rule may by order of the Lord Chancellor from time to time be applied," certain procedure is directed to be adopted.

The rule has been applied to the German Empire by order of the Lord Chancellor, dated July 4, 1904 ([1904] W. N., Pt. II., 231), and to the Russian Empire by a similar order dated March 21, 1906 ([1906] W. N., Pt. II., 99).

Rule 8A: "The Court or a judge may direct that any summons, order or notice shall be served on any party or person in a foreign country, and the procedure prescribed by Order XI. rule 8, with reference to serving notice of a writ of summons shall apply to the service of any summons, order or notice so directed to be served."

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decision in *Rasch & Co.* v. *Wulfert* (1) that there was no jurisdiction to give leave for service out of the jurisdiction of a summons for leave to enforce an award. The rule gives jurisdiction to grant leave for service out of the jurisdiction of any summons, order, or notice, but only in those foreign countries to which Order XI., r. 8, has been applied by order of the Lord Chancellor. As r. 8 has only been applied to Germany and Russia, there was no jurisdiction to grant leave for service of the notice upon the applicants in France.

But if the operation of Order XI., r. 8A, is not confined to Germany and Russia, some limitation must be placed upon the generality of its language. It was not intended to give wider jurisdiction to grant leave for service out of the jurisdiction of a summons, order, or notice than exists in the case of a writ of summons. Therefore Order XI., r. 8A, must be read subject to the limitations contained in Order XI., r. 1. The respondents must therefore shew that there has been a breach within the jurisdiction of a contract, or in some other way satisfy the conditions imposed by Order XI., r. 1. Upon the facts it is impossible for them to do that, and it follows that they cannot satisfy the conditions upon which alone the jurisdiction to order service of the notice out of the jurisdiction would arise. [Order LIV.A of the Rules of the Supreme Court, 1883; *Henry* v. *Engley, Myrice Claimant* (2); and the Annual Practice, 1910, vol. 1, p. 71, were also referred to.]

Colam, for the respondents. In giving judgment in *Rasch & Co.* v. *Wulfert* (1) Collins M.R. said that there is a distinction "between an agreement to refer disputes and an actual submission of a dispute to a particular arbitrator." The appellants in that case had not appointed an arbitrator, but in the present case both parties appointed an arbitrator, and the arbitrators appointed an umpire who acted with the consent of the parties and made his award in this country. The case is therefore within the distinction pointed out by Collins M.R., and there was jurisdiction by the express terms of Order XI., r. 8A, to grant the leave for service of the notice out of the jurisdiction. Order XI., r. 8A,

(1) [1904] 1 K. B. 118 (2) (1907) C. A. Unreported.

contains no limitation on the power given to grant leave for service of a notice outside the jurisdiction. The notice is to be served in the manner indicated by Order xi., which will depend on whether r. 8 has or has not been applied to the foreign country where the service is to take place.

Further, the parties have by their arbitrators acquiesced in the umpirage and an award being made in England by a person having an English domicil. The applicants may therefore be regarded as constructively domiciled in England. There was therefore jurisdiction to grant the leave for service of the notice under Order xi., r. 1 (*c*), read together with Order xi., r. 8A.

Lastly, by the submission of the dispute to arbitration in this country the parties impliedly agreed to conduct the arbitration here in a proper way. The applicants improperly submitted evidence to the umpire without the knowledge of the respondents, and they have therefore committed a breach within the jurisdiction of a contract which ought to have been performed within the jurisdiction. There was therefore jurisdiction to grant leave for service of the notice outside the jurisdiction under Order xi., r. 1 (*e*), coupled with r. 8A of that Order. [*Moseley* v. *Simpson* (1) was also referred to.]

Lord Alverstone C.J. This case raises a question of difficulty. Upon October 30, 1909, Mr. Mears, of London, the umpire appointed by the two arbitrators, made an award in this country. By that award he found that the respondents, a Swedish company, who under the contract of October 15, 1907, were the sellers, should forthwith pay or make an allowance to the applicants, a French company, who were the buyers under the contract, of 14*s.* 6*d.* a ton on the invoiced weight of the wood pulp. Under the contract the respondents were to "elect" a domicil in Paris. The contract contained an arbitration clause which provided that all disputes were to be settled by arbitration. Each party had power to appoint an arbitrator, and the arbitrators had power to appoint a third person as umpire. The arbitrators appointed by the parties were an Englishman by the respondents and a Frenchman by the applicants. The arbitrators appointed an English

(1) (1873) 42 L. J. (Ch.) 739.

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umpire, who made his award. On March 17, 1910, a Divisional Court granted leave to the respondents for service out of the jurisdiction of a notice of motion to set aside the award. The notice was addressed to the applicants, "of Wizernes, France." It did not purport to be a notice calling upon the umpire to do anything, or in order to bring him before the Court on notice to the applicants; it was a notice to the applicants, a French company, and therefore this case raises the distinct question whether or not leave for service out of the jurisdiction on a foreign company of such a notice can be given. On May 11, 1910, the applicants took out a summons to set aside the leave for service out of the jurisdiction of the notice on the ground that the Court had no jurisdiction to order the service of that notice upon the applicants in France. The summons was referred by Bucknill J. to this Court, and we have now to decide whether the Divisional Court had jurisdiction to grant the leave for service out of the jurisdiction of the notice.

On behalf of the respondents it was at first contended that Order XI., r. 8A, expressly gave the Court power to grant the leave for service of the notice out of the jurisdiction, that by virtue of the rule the Court could direct any notice to be served upon any person or corporation in any foreign country, and that the procedure prescribed by Order XI. applied to the service of any summons, order, or notice so directed to be served. But ultimately the full extent of that proposition was not maintained, and it was admitted on behalf of the respondents that they must shew (as I think is clear) that they had a case which fell within one of the clauses of Order XI., r. 1.

With regard to Order XI., r. 8A, I do not desire to say anything with reference to matters which came before me as a member of the Rule Committee. It is possible that the Rule Committee may have assented to a rule which goes much further than they intended, but as I understand the operation of r. 8A it is this. The previous operative part of Order XI., which applies to writs of summons, had caused a difficulty with regard to the service of other notices or summonses which the Court or the parties desired should be served on persons abroad, and particularly with regard to the service of originating

summonses which, as Collins M.R. pointed out in *Rasch & Co.* v. *Wulfert* (1), are the nearest approach to writs of summons, and accordingly r. 8A was added. The effect of that appears to me to be perfectly clear. The first portion of it extends the ambit of the rules, other than r. 8, to other official proceedings beyond writs of summons—to a summons, to an order, or to a notice. But the state of circumstances which justifies the Court in granting leave for service out of the jurisdiction under Order XI. of a document of that character must still be shewn. The rule then proceeds to say that as to documents which come within the provisions of r. 8, which relates only to certain countries to which the Lord Chancellor has directed it to apply, the provisions of r. 8 shall apply. That construction makes r. 8A perfectly intelligible.

On behalf of the respondents it was contended that the present case is within what I may call the limited class enumerated in Order XI., r. 1, as to which the Court has jurisdiction to grant leave for service out of the jurisdiction of notice to set aside the award. Neither clause (*a*) nor (*b*) of r. 1 was relied on, but to a certain extent reliance was placed on clause (*c*), and it was suggested on behalf of the respondents that because the arbitrators appointed an English umpire the applicants have, to a certain extent, brought themselves into a kind of constructive English domicil. I am unable to assent to that contention. On behalf of the respondents clause (*e*) of Order XI., r. 1, was also relied upon, and it was said that because the arbitrators exercised their power to appoint an English umpire, and the arbitration took place in England, the rules relating to arbitration in England apply, and that there was an implied undertaking on the part of the applicants, the French company, that they would not transgress any of the rules applicable to such an arbitration. I must say that that is a very far-fetched argument indeed. It seems to me to involve reading into the bargain between the parties by way of implication a number of provisions constituting some contract to be performed within the jurisdiction which goes very far beyond the contract which is plainly expressed. I am unable to accept the view that, because one of the parties

(1) [1904] 1 K. B. 118.

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to the contract having a French domicil appointed an English arbitrator who together with the arbitrator for the other party appointed an English umpire, a contract arose in respect of a breach of which leave can be given for service out of the jurisdiction of a writ or notice.

In these circumstances we have to deal with this specific question of jurisdiction: Can leave be given for service outside the jurisdiction upon parties domiciled abroad of a notice that they are to come to this Court in order to support an award? If the text-books and the authorities so far as they exist—by which I mean the judgments delivered in *Rasch & Co.* v. *Wulfert* (1)—be considered, the statements they contain appear to shew clearly that a notice to set aside an award cannot be served on a foreigner outside the jurisdiction. Mr. Colam most fairly admitted on the respondents' behalf that the judgments in *Rasch & Co.* v. *Wulfert* (1) are prima facie against him. In that case it was held that there was no jurisdiction to allow service on the appellants out of the jurisdiction of a summons for leave to enforce the award under the Arbitration Act, 1889. But while admitting that a notice based upon our local jurisdiction either to enforce or set aside an award cannot be granted in the circumstances mentioned in *Rasch & Co.* v. *Wulfert* (1), he relied upon the following passage in the judgment of Collins M.R.:—"It does not appear to me that the existence of the award against them is, as has been suggested, sufficient evidence that they had submitted to the jurisdiction. There is a distinction, I think, for this purpose between an agreement to refer disputes and an actual submission of a dispute to a particular arbitrator. A mere contract to refer disputes does not seem to me to amount for this purpose to a submission in fact to the jurisdiction of the arbitrator here. The person so contracting may be under a contractual obligation to submit, but I do not think that he, therefore, can be considered to have actually submitted to the arbitration here, so as to give an English Court jurisdiction over him." And Mathew L.J. says, "I am not prepared to say that by implication any such jurisdiction as that contended for is given to an English Court."

(1) [1904] 1 K. B. 118.

I am of opinion that in order to confer jurisdiction to grant leave for service out of the jurisdiction of notice to set aside an award in circumstances in which service out of the jurisdiction of a writ could not be allowed much clearer language than anything that occurs in the provisions of Order XI., or of any other Order to which our attention has been called, would be required. In my judgment the service of a summons, order, or notice contemplated by r. 8A of Order XI. is subject to the limitations which surround the service of a writ. There is no ground for saying that in the present case service out of the jurisdiction of a writ upon the applicants could be allowed merely because it is suggested that at some stage of the arbitration some step was taken which may have been—I express no opinion upon it—contrary to the rules which apply to arbitrations conducted in England under English law. In my judgment, therefore, this Court had no jurisdiction to grant the leave for service of the notice upon the applicants. If the practice as indicated in *Rasch & Co.* v. *Wulfert* (1) is to be departed from, it can only be by virtue of the decision of a Court of higher jurisdiction than this Court. The application therefore succeeds, and the order granting leave for service of the notice upon the applicants must be set aside.

PICKFORD J. I agree. This is an application to set aside an order of this Court giving leave to serve out of the jurisdiction a notice of motion to set aside an award made in the circumstances which have been stated by my Lord and which I need not repeat. The leave was granted under the provisions contained in Order XI., r. 8A. It seems to me that the effect of that rule is pretty clear. The intention is to place summonses, orders, and notices on the same footing as writs, and to give power to serve them out of the jurisdiction in the same way that writs are served. If they are to be served in countries to which r. 8 of Order XI. does not apply, then they will be served in one particular manner. If they are to be served in countries to which r. 8 does apply, then they have to be served in another manner. But I do not think that r. 8A was ever intended to give, or does give, a right to

(1) [1904] 1 K. B. 118.

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grant leave to serve a notice out of the jurisdiction when leave to serve a writ could not be given, and it follows that, if leave could be given to serve the notice in the present case out of the jurisdiction, it must be founded upon one of the matters which are mentioned in Order XI., r. 1, as giving a right to have a writ served out of the jurisdiction.

It is contended that the notice is within either clause (*c*) or (*e*) of Order XI., r. 1. It is conceded that it does not come within any of the other clauses of that rule. For the reasons given by my Lord, I think there is no ground for saying that the applicants, the French company, have elected to have a domicil within the jurisdiction of these Courts, and I also think that relief is claimed by the notice against them and not against the umpire. There is, therefore, no relief claimed against any person who is domiciled or ordinarily resident within the jurisdiction, and it follows that the notice is not within clause (*c*).

It was also contended that the notice is within clause (*e*) of Order XI., r. 1. It was not contended that this notice is founded upon the breach of any contract arising from the obligations created by the award, but it was said to be founded upon the breach of an implied contract on the part of the applicants to conduct themselves properly in the arbitration. I do not think that that contention is correct. I do not think that the case is brought within the words of clause (*e*) of Order XI., r. 1, because I do not think that the notice is founded "on any breach or alleged breach within the jurisdiction of any contract." I therefore think that this notice is not within the limitations which are imposed by r. 1 of Order XI., and that therefore there was no jurisdiction under r. 8A of that Order to grant the leave which was given by the Court. The order granting that leave must be set aside.

LORD COLERIDGE J. I am of the same opinion. Rule 8A of Order XI. is only supplemental to, not independent of, the remainder of the rules contained in the Order. The Lord Chancellor has not applied r. 8 to France, and it is therefore inapplicable to persons ordinarily domiciled in France. The respondents must therefore bring themselves within Order XI.,

r. 1. They are not within r. 1, clause (*c*), because the person—or rather the company—against whom the relief is sought is not domiciled or ordinarily resident within the jurisdiction, but in France. The respondents are not within clause (*e*), because that clause is only applicable to actions founded upon a breach or alleged breach within the jurisdiction of any contract wherever made which according to the terms thereof ought to be performed within the jurisdiction. The only suggestion which has been made is that a writ could have been served upon the applicants for a breach of an implied contract not to misconduct themselves before the umpire. I know of no such action at law, and therefore I do not think that any such writ of summons could issue, and, that being so, the provisions of clause (*e*) of r. 1 of Order XI. do not apply.

Order granting leave to serve notice of motion out of jurisdiction set aside.

Solicitors for applicants: *Goldberg, Barrett & Newall.*
Solicitors for respondents: *Munns & Longden.*

J. E. A.

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June 14.

In re An Arbitration between CRIGHTON and THE LAW CAR AND GENERAL INSURANCE CORPORATION, LIMITED.

Arbitration—Delivery of Pleadings—Power of Arbitrator to allow Amendment of Pleadings.

An arbitrator has a discretion as a judicial officer to allow an amendment of pleadings delivered by the parties in compliance with a direction given to them by him.

Special Case stated by an arbitrator under s. 19 of the Arbitration Act, 1889.

By a policy of insurance dated March 23, 1909, the respondents, the Law Car and General Insurance Corporation, Limited, agreed upon certain conditions set out therein to indemnify the applicant, Crighton, against all sums for which the applicant should be liable in respect of any injury to any employee in his service (inter alia) under the Workmen's Compensation Acts, 1897, 1900, and 1906, or at common law, and the respondents under the same conditions thereby further agreed to be responsible for all costs and expenses incurred with their consent in defending any claim for compensation.

Conditions 5 and 8 set out in the policy were as follows:—

"5. The first premium and all renewal premiums that may be accepted are to be regulated by the amount of wages and salaries and other earnings paid to employees by the insured during each period of insurance. The name of every employee and the amount of wages, salary and other earnings paid to him shall be duly recorded in a proper wages book. The insured shall at all times allow the corporation to inspect such books and shall supply the corporation with a correct account of all such wages salaries and other earnings paid during any period of insurance within one month from the expiry of such period of insurance and if the total amount so paid shall differ from the amount on which premium has been paid the difference in premium shall be met by a further proportionate payment to the corporation or by a refund by the corporation as the case may be."

"8. If any question or difference shall arise touching the meaning of this policy or its conditions or as to the rights obligations or liability of either party hereunder the same shall be referred to arbitration under the Arbitration Act 1889 . . . . or any other Act which may for the time being be in force and apply to the particular case in which such question or difference shall have arisen."

On April 28, 1909, one John Hodds, who was alleged to have been a workman then in the employ of the applicant, was killed by a traction engine.

A claim for compensation under the Workmen's Compensation Act, 1906, was made against the applicant by the widow of John Hodds, and a request for arbitration was filed in the county court of Norfolk holden at Eye. This action was heard on September 30, 1909, by the county court judge sitting as arbitrator, who held that the applicant was liable to pay to the dependants of the workman the sum of 300*l.*

The applicant thereupon applied to the respondents to pay him the 300*l.*, but the respondents repudiated liability under the policy.

On December 9, 1909, the applicant and respondents by their respective solicitors signed the following submission to the arbitrator :—"We agree to refer all matters in difference between us under the above policy to the award of Vaughan Williams, Esquire."

On December 17, 1909, the solicitors for the applicant and respondents respectively attended before the arbitrator, who, on the suggestion of the solicitors, directed points of claim to be delivered within three days and points of defence within eleven days thereafter. He further directed that mutual affidavits of documents should be filed and exchanged by January 5, 1910, and that immediate inspection should be mutually had of the documents which should be disclosed. The applicant's points of claim and the respondents' points of defence were duly delivered and the respective affidavits of documents exchanged, and the documents were inspected on January 21, 1910.

On January 25, 1910, the parties attended before the arbitrator, and upon the application of the respondents he

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directed the applicant to make a further affidavit of documents, which was duly sworn and delivered.

On February 3, 1910, the applicant applied by counsel for and obtained from the arbitrator an interlocutory direction for further and better particulars to be given by the respondents of paragraph 4 of the points of defence, which stated certain grounds on which the respondents repudiated liability.

On February 4, 1910, the arbitrator held a sitting to proceed with the reference, and the parties with their respective solicitors and counsel attended before him. At the outset counsel for the respondents intimated that he desired to amend his points of defence by adding thereto a ground not therein included upon which to resist the claim, namely, that the applicant had failed to keep a proper wages book in accordance with condition 5 of the policy, and that, in consequence, the respondents were not liable under the policy. Counsel for the applicant objected to an amendment being allowed at the then stage of the proceedings, stating that it would (if allowed) involve a reply containing a claim for rectification of the policy or an allegation that the clause was void or voidable, and the arbitrator ruled that if the matter lay in his discretion he refused to allow the proposed amendment.

It was submitted to him by counsel for the respondents that he had no discretion to refuse the amendment or to refuse to allow the new point of defence to be raised, and that points of claim and defence in an arbitration were directed as a matter of convenience only; that the arbitrator had no power to exclude any evidence relevant to matters within the submission and no discretion or power to refuse to hear and determine the validity of any ground of defence to a claim under the policy, whether such ground of defence had been specifically raised in the points of defence or not; that it was the duty of the arbitrator to determine all matters in difference between the parties under the policy which was brought before him, and that the new matter desired to be raised by the respondents was a matter in difference which could not be excluded from consideration merely because it had not been put forward in the points of defence delivered before the first sitting of the arbitrator to

proceed with the reference, whether or not such new points had been raised on the points of claim or the points of defence. It was arranged that this question should be argued at the next sitting.

At the next sitting, on February 12, 1910, after hearing counsel for the applicant and the respondents, the arbitrator ruled in favour of the respondents' counsel's contention, and at the arbitrator's request the ground of defence then sought to be raised by the respondents was put into writing and was as follows: "The respondents will also rely upon the following: Condition 5 of the policy was not complied with. No proper wages book was kept by the applicant within the meaning of condition 5."

Counsel for the applicant then applied to the arbitrator to state a special case under s. 19 of the Arbitration Act, 1889, and he accordingly stated this case.

The question for the opinion of the Court was whether the arbitrator had in this arbitration a discretion as to whether or not he would allow the applicant's claim to be disputed on the new ground sought to be put forward by the respondents, having regard to the fact that it was not raised in the points of defence originally delivered by them, or whether the respondents were entitled as of right to raise before the arbitrator the new ground of defence which they sought to put forward for his consideration.

E. L. Benson (*A. M. Langdon, K.C.*, with him), for the applicant. By consenting to points of pleadings being delivered the parties have made the points of pleadings part of the submission. An arbitrator has a discretion whether he will allow an amendment where pleadings have been delivered, and he was right in ruling that if he had a discretion he should refuse to allow the amendment. [*Lloyd* v. *Sturgeon Falls Pulp Co.* (1), *In re Enoch and Zaretzky, Bock & Co.'s Arbitration* (2), and the First Schedule, clause *f*, of the Arbitration Act, 1889 (52 & 53 Vict. c. 49), were referred to.]

J. B. Matthews and *H. C. Dickens*, for the respondents. An arbitrator must allow an amendment in the pleadings until a certain

(1) (1901) 85 L. T. 162. (2) [1910] 1 K. B. 327.

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stage is reached at which an amendment could not be allowed without injustice to the other party. It must be admitted that at that stage a discretion would arise and the arbitrator would have power to refuse to allow the amendment. But that stage was not reached in the present case, and the arbitrator had no discretion in the matter, but was bound to allow the amendment. The application to amend was made at the first sitting. If all the evidence had been given it would have been right for the arbitrator to rule that no new point could be raised. Up to that stage either party has a right to bring forward the real points in difference. The tendency of the Courts to allow amendments subject to payment of costs has been gradually increasing, and an arbitrator ought to be guided by the same rules. The duty of an arbitrator is to consider all matters in difference brought before him, unless such a stage has been reached that injustice would be done to the other side by allowing a fresh matter to be brought forward. At that stage a party is prevented by the principle of estoppel from bringing forward a matter he ought to have placed before the arbitrator earlier. In the present case the matter in difference was liability on the policy, and the arbitrator by allowing the amendment would not be introducing any fresh matter in difference, while by refusing it he would be shutting out a defence to a matter in difference. *Lloyd* v. *Sturgeon Falls Pulp Co.* (1) has no application. [*Cropper* v. *Smith* (2) and *Hubbuck* v. *Helms* (3) were also referred to.]

LORD COLERIDGE J. In this case a question of some importance arises for our decision with regard to the extent of the discretion of an arbitrator to allow one of the parties during the course of an arbitration to add a ground of defence to those he has already disclosed in the points of defence delivered by him under an order of the arbitrator. The arbitrator was asked by the respondents to hold as a matter of law that he was bound to allow the amendment and had no jurisdiction to refuse to allow the additional point

(1) 85 L. T. 162. (2) (1884) 26 Ch. D. 700.
(3) (1887) 56 L. J. (Ch.) 536.

to be pleaded before him. He agreed with that contention, and also said that if the matter lay in his discretion he refused to allow the proposed amendment. The main, if not the sole, question that we have to determine is whether he was right in his view of the law. The matter has never been the subject of quite distinct and definite decision, but there are authorities which more or less bear upon the point. In *Lloyd* v. *Sturgeon Falls Pulp Co.* (1) the question arose whether certain documents constituted the point in dispute in reference to a contract or whether they were in the nature of pleadings or particulars which were capable of amendment by the arbitrator, and whether the arbitrator could amend the pleadings so as to order the rescission of the contract. The decision upon that point was that the documents in question were in the nature of pleadings and particulars and were therefore capable of amendment by the arbitrator. Bruce J. said "We are of opinion that it is in the discretion of the arbitrator to allow amendments on such terms as he may think fit in order to allow the parties to raise such points, and that if the claimants claim rescission of the contract it will be open"—observe not "his duty"—"to the arbitrator to make any amendment he may think fit to enable the claimants to give evidence of facts which entitle them to rescind the contract." The decision of the Court upon that point seems to me to be a guide in the present case, if not decisive of the matter. The contention that an arbitrator is bound to allow an amendment was very much weakened by the admission which was perforce made during the arguments before us by counsel for the respondents that a stage in the proceedings must be reached at which it is obvious that no amendment could possibly be allowed. If that is so, it seems to us to be a very strong argument in favour of the discretion existing on the part of the arbitrator to allow or refuse amendments of this class. The amendment that was asked to be introduced arose under the provisions of condition 5 of the contract contained in the policy. Leave to insert an allegation of the non-fulfilment of that condition by way of amendment as an additional point of defence was asked. In those circumstances we are of opinion that the

(1) 85 L. T. 162.

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arbitrator had a discretion to admit the amendment or to refuse permission to make it. Whether he exercised his discretion wisely and justly or not is not for us to decide.

But, speaking for myself, I wish to point out in the fewest possible words the principle which should guide an arbitrator in admitting amendments of this class. There has been very strong language used—I may almost say increasingly strong language as years roll by—by the Courts in favour of making amendments where it can be done without manifest and grave injustice to the other side. In *Cropper* v. *Smith* (1) Bowen L.J. said that "there is one panacea which heals every sore in litigation, and that is costs. I have very seldom, if ever, been unfortunate enough to come across an instance, where a person has made a mistake in his pleadings which has put the other side to such a disadvantage as that it cannot be cured by the application of that healing medicine." In *Indigo Co.* v. *Ogilvy* (2) Lindley L.J. gives effect to the same doctrine; and, further, in *Hubbuck* v. *Helms* (3) Stirling J. expressed the opinion that an amendment ought to be allowed—at any rate it is not a ground for refusing an amendment—even if it amounts to an entire change in the nature of the action. He said that although the amendment suggested did substantially change the nature of the action, yet it was an amendment which was not thereby excluded from being granted.

In these circumstances we think that the arbitrator was not bound to make the amendment; we think it was within his discretion to refuse it or to make it; but we wish to point out the governing principles of law which ought to guide him in the exercise of his discretion, and I have no reason to doubt that he will accurately follow those principles in refusing or admitting the amendment in question when the matter comes before him.

SCRUTTON J. I am of the same opinion, and as the matter is of some general importance, I desire to add in my own words—without detracting from the force of the judgment given by my brother—the reasons upon which I base my decision.

The policy contained an arbitration clause by which any

(1) 26 Ch. D. 700. (2) [1891] 2 Ch. 31.
(3) 56 L. J. (Ch.) 536.

dispute or difference was to be referred to arbitration. A dispute or difference having arisen, a member of the Bar was appointed arbitrator, and he ordered the parties to define the difference by delivering to each other points of claim and defence. In my view he had a right to do that, both by his inherent powers as a judicial officer and under s. 2 coupled with the First Schedule, clause *f*, of the Arbitration Act, 1889. The parties thereupon delivered points of claim and defence which precisely defined their points of difference. The respondents then discovered by means of the documents disclosed by the applicant that there was in their view a defence open to them which they desired to raise, and they asked the arbitrator for leave to raise it. The arbitrator at first took the view that he would not allow it in the exercise of his discretion if the discretion existed. An argument was then addressed to him that he had no discretion to disallow it, but that he must decide any point which either party alleged to be in difference. He, after consideration, decided in favour of that view, but, at the applicant's request, stated a special case for the opinion of the Court under s. 19 of the Arbitration Act, 1889, the question raised by the case being whether or not he had a discretion to allow the new ground of defence to be raised. In my opinion he had the discretion. When once the parties had made precise by their points of claim and defence the matters in difference, in my view the arbitrator was then master of the arbitration and could determine whether or not any new point in difference should or should not be introduced; in other words, he had a judicial discretion to allow the amendment or not. But, as my Lord has pointed out, the discretion was to be exercised on judicial principles, and I think the Courts, in language of increasing strength, have for some time said that every amendment ought to be made which does not do injustice to the parties, and that very few amendments do an injustice which cannot be compensated for by the payment of costs. In the present case the amendment was proposed before any evidence had been taken. I express no opinion as to whether it should have been allowed or not. Our functions are confined to answering the question asked us, which is whether the arbitrator has a discretion; but I have no doubt that in considering whether he

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ought to exercise his discretion the arbitrator will act on the well-known judicial principles to which I have referred.

Judgment accordingly.

Solicitors for applicant: *Richardson Sowerby, Holden & Co., for Foley & Munro, Bolton.*

Solicitors for respondents: *Nicholson, Graham & Jones.*

J. E. A.

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April 21, 22; *May* 2; *June* 13.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* ELLIS.

Criminal Law—False Pretences—Evidence of other Frauds—Admissibility—Questions tending to shew that Prisoner has committed Offence other than that with which he is charged and is of bad character—Opening Speech for Defence—Evidence of Good Character—Admissibility of Evidence of Bad Character—Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), *s.* 1 (*f*).

Whether a question put to a person charged with a crime and called as a witness tends to shew, within the meaning of s. 1, clause (*f*), of the Criminal Evidence Act, 1898, that he has committed or been convicted of or charged with any offence other than that with which he is then charged cannot be decided by looking merely at the single question. Each question must be judged by the light of others asked before and after. The object of the enactment is that it should not, except in the specified circumstances, be suggested to the minds of the jury by means of any questions put to the prisoner that he has committed another offence. Any question or series of questions which would reasonably lead a jury to believe that he had committed another offence would tend to shew that the prisoner had committed that other offence. If a question does so tend, it is quite immaterial whether it would be admissible on other grounds. It is the duty of the judge not to wait for any objection to the question from the prisoner's counsel, but to stop the question himself, and to direct the jury to disregard it and not allow it to influence their minds.

A general examination on behalf of a prisoner as to the surrounding circumstances is not evidence of good character so as to entitle the prosecution to prove or to cross-examine as to other offences or convictions. Sub-clause (ii.) of clause (*f*), s. 1, of the Criminal Evidence Act, 1898, is intended to apply to cases where witnesses to character are called, or where evidence of the good character of the prisoner is sought to be elicited from the witnesses for the prosecution. It is to

this class of evidence that the statute refers, not to mere assertions of innocence or repudiation of guilt on the part of the prisoner, nor to reasons given by him for such assertion or repudiation.

The appellant was convicted upon an indictment for obtaining from D. cheques by false pretences. The indictment alleged that he sold various articles of virtù to D. under an agreement that he was to charge D. the cost price plus 10 per cent. profit; that the appellant represented to D. that the cost was much in excess of the real cost; and that by this means he had obtained from D. much larger sums than he was entitled to. The appellant gave evidence on his own behalf, and in cross-examination questions were put to him suggesting that in other transactions he had obtained money from D. by alleging that certain china figures were genuine pieces of old Dresden china, whereas he knew that they were not:—

Held, that the alleged false pretences in representing the articles to be genuine old Dresden china when they were not so were entirely distinct from those with which the prisoner was charged, and that, as upon that ground evidence of the false representations with regard to the articles being genuine old Dresden china was not admissible to shew that he was guilty of the false pretences with which he was charged, the questions put in cross-examination were improperly allowed, inasmuch as they tended to shew that the appellant had committed an offence other than that with which he was charged, and that the conviction must be quashed, as the jury must have been influenced by the questions and answers.

APPEAL by Arthur Thomas Ellis against his conviction.

The appellant was indicted at the Central Criminal Court for obtaining certain valuable securities, namely, cheques, from one Charles John Dickins by false pretences. Mr. Dickins died before the trial, which took place before the Recorder on March 11, 12, 14, 16, and 17, 1910. The false pretences alleged in the indictment related to certain articles of virtù which the appellant had sold to Mr. Dickins under an agreement by which the appellant was to charge Mr. Dickins the cost price to the appellant of the articles plus 10 per cent. profit. The indictment contained six counts. It was alleged in each count that certain articles of virtù therein mentioned had been sold by the appellant to Mr. Dickins under an agreement by which he was to charge Mr. Dickins the cost price plus 10 per cent. profit. The false pretences alleged were that he had represented to Mr. Dickins that the cost was much in excess of the real cost of the articles respectively, and that by this means he had obtained from Mr. Dickins the cheques with intent to defraud.

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There was a second indictment against the appellant, which was not tried and which was not before the Recorder, except indirectly as hereinafter stated, under which the appellant was charged with further false pretences, which included the following:—(*a*) That he had obtained money from Mr. Dickins by falsely pretending that a certain china figure, described in an invoice sent to Mr. Dickins on July 17, 1900, as a figure of Countess Cozier, was a genuine piece of fine old Dresden china and that he had acquired it on July 16, 1898, as a genuine piece of fine old Dresden china. (*b*) That he had committed a similar fraud in falsely representing that a certain china group, described in an invoice dated December 30, 1902, as a fine old Dresden group of two noblemen in masonic costume dividing the globe, was a piece of genuine fine old Dresden china.

In all the six cases the subject of the indictment which was tried entries had been made in the appellant's books which apparently shewed the cost to him of the articles as well as the prices he charged Mr. Dickins. These entries were the evidence on which the prosecution relied as shewing the real cost, and if they in fact shewed the real cost, it was clear that the appellant had obtained more from Mr. Dickins than he was entitled to. The appellant's case was that they shewed only part of the cost, and that he had paid more for the articles than the figures shewn in the books, and that he had only charged Mr. Dickins the actual sums he had paid plus 10 per cent.

Before any criminal proceedings were commenced the executors of Mr. Dickins had brought an action against the appellant for damages for fraud. The original statement of claim in that action alleged fraud in the sale of a considerable number of articles not including any of those mentioned in the six counts, but this statement of claim was afterwards amended by including all the articles in the six counts. At the trial before the Recorder evidence was given on the part of the prosecution that the action mentioned above came on for trial; that the then defendant (the present appellant) attended the trial on the first day, but not subsequently; that he was not called as a witness to deny the fraud, nor were any witnesses called on his behalf; and that the verdict passed for the plaintiffs with large damages. It

was further shewn that after the first day of the trial of the action the appellant had gone abroad and had remained there till after the criminal proceedings were commenced.

Upon the argument of the present appeal it did not clearly appear whether at the trial before the Recorder the prosecution put in all the proceedings in the action, but it was clear that the result of the action transpired at the trial before the Recorder, and no objection was then made on behalf of the appellant. It was also given in evidence at the trial before the Recorder that Grantham J., who tried the action, had ordered the documents to be impounded, and no objection was taken with regard to this evidence.

At the trial before the Recorder, counsel on behalf of the appellant made certain observations in his opening speech for the defence which it was contended in the Court of Criminal Appeal by the prosecution tended to establish the appellant's good character, but the Court of Criminal Appeal held that the observations were not of that nature. In the examination-in-chief of the appellant at the trial before the Recorder his counsel asked questions relating to his purchase of the business, to his general relations with Mr. Dickins, and to other transactions under the cost price plus 10 per cent. agreement. Counsel on behalf of the prosecution objected, and the appellant's counsel did not further pursue that line of examination. At the trial before the Recorder the appellant gave evidence on his own behalf, and in cross-examination the following questions were put to him by counsel for the prosecution. Questions numbered 2056 to 2074 (in the transcript of the shorthand note of the evidence) were directed to proving by means of entries in the appellant's books that he bought a figure of Countess Cozier from one Hoffman on July 16, 1898, under the description "Figure of a Lady in crinoline and green cloak" for 30*l.* and sold it the same day to Mr. Dickins for 430*l.* under a much more elaborate description. Question 2076.—"In your day-book is this what the lady in crinoline has developed into: 'A figure of Countess Cozier of fine old Dresden porcelain of exceptional quality, in large crinoline, beautifully painted with detached bunch of flowers in gold trellis medallion, with long flowing train of green colour on Louis XV.

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plain ormolu mount,' 430*l.*?" Question 2077.—"The figure of Countess Cozier is well known in Dresden china circles, is it not?" The answer of the appellant to the question was that it was a well-known and valuable piece. Question 2081.—"Do you suggest that by that day-book entry, and the invoice which tallies exactly with it, you were not representing to Mr. Dickins that that was the Countess Cozier, the well-known Dresden china piece?" This line of cross-examination was followed up: Question 2088.—"Do you tell the jury that you before that date, July, 1900, did not know of the Countess Cozier as a very important piece of Dresden china?" The appellant replied in the negative to this question. A number of questions (2089 to 2097) were then asked the appellant which were directed to shew that he was an expert and must therefore have known of the existence of that well-known valuable piece of china, and that the article he sold was not that piece. Questions 2103 to 2113 were directed to shew that Hoffman, from whom he bought that piece, was also an expert and would never have sold such a valuable piece of china if it were genuine for 30*l.* Question 2170.—"This is a photograph, is it not, of the piece that you sold for 430*l.*?" At this point of the cross-examination counsel for the appellant interposed with an objection that the cross-examination was irrelevant and that it related to a fraud not in the indictment which was being tried. The Recorder, however, overruled the objection upon the ground that the cross-examination was taking place for the purpose of suggesting to the jury that there had been fraud in cases other than those set out in the indictment which was being tried. Accordingly the cross-examination was allowed to proceed, and the appellant was asked to admit statements which had been made by Mr. Alfred Dickins, a witness, at Bow Street when he was giving evidence in support of the charge in the second indictment, and a photograph and a pencil sketch, both of which had been put in evidence at Bow Street, were handed to the jury to shew that the appellant's explanation must be untrue. Questions 2208 to 2255 related to what was called at the trial before the Recorder the Peter the Great and Augustus the Strong piece of china, i.e., the china group mentioned in the invoice of December 30, 1902, and which

was the subject of the second indictment. The questions were directed to shew by means of entries in the appellant's books that he had bought the article for 30*l.* or perhaps 60*l.* from one Woolman and had resold it to Mr. Dickins for 440*l.*

At the end of the evidence the Recorder refused to allow evidence to be given by the prosecution in reply as to the Cozier case.

The jury acquitted the appellant on counts 2 and 3, but convicted him on counts 1, 4, 5, and 6.

The grounds of the appeal were (inter alia), first, that as the jury returned a verdict of not guilty on counts 2 and 3, there was no evidence on which they could properly return a verdict of guilty on any of the remaining counts. Secondly, that the Recorder was wrong in law in admitting evidence of the proceedings in and of the result of the civil action and in calling upon the appellant to explain why he did not give or call evidence at the trial of that action. Thirdly, that the Recorder was wrong in law in permitting questions and documents to be put to the appellant in cross-examination for the purpose of shewing that he was guilty of frauds of a different nature to that alleged in the indictment which was being tried and which formed the subject-matter of an indictment on which the appellant was not being tried.

The appeal was first argued on April 21 and 22 before Lord Alverstone C.J., Bray J., and Pickford J., but the Court considered head 3 of the grounds of appeal mentioned above a point of so much importance and difficulty that it was advisable to have it argued before a Court of five judges, and accordingly the appeal came on for hearing on May 2 before a Court consisting of Lord Alverstone C.J., Jelf J., Bray J., A. T. Lawrence J., and Lord Coleridge J.

Reginald J. White, for the appellant. The fact that the jury returned a verdict of not guilty on two counts shews that there was no evidence on which they could convict the appellant on the four other counts. The Recorder wrongly admitted in evidence the result of the civil action against the appellant. The evidence

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that the defendant did not give evidence at the civil trial was also inadmissible. The questions put to the appellant in cross-examination as to the Countess Cozier and the Peter the Great and Augustus the Strong pieces of china were inadmissible as being contrary to the provisions contained in s. 1, clause (*f*), of the Criminal Evidence Act, 1898. (1) The offence with which the appellant was charged in the indictment which was being tried was that of obtaining cheques from Mr. Dickins by means of false representations as to the cost price of the articles. The questions put in cross-examination tended to shew that the appellant had committed offences of a totally different character, namely, obtaining cheques from Mr. Dickins by false representations that articles were genuine old Dresden china when they were not so, and the proof of these frauds was not admissible evidence to shew that he was guilty of the offences charged in the indictment before the Court. The questions were therefore in direct contravention of clause (*f*) of s. 1 of the Act of 1898 as being questions "tending to show that" the appellant had committed offences other than those wherewith he was then charged: *Reg.* v. *McDonnell*. (2) The questions related to charges contained in another indictment which was not then before the Court. Even if the questions tended to shew system on the part of the appellant they were not admissible, as no question of system was before the jury. The only question was whether the statements to which the indictment before the Court referred were true or false. The questions tended to shew that the general character of the appellant was bad and that he was a fraudulent person:

(1) Criminal Evidence Act, 1898, s. 1, clause (*f*): "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

"(i.) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

"(ii.) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character . . . ."

(2) (1850) 5 Cox, 153.

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Rex v. *Bond*. (1) Even if the questions were admissible, as the facts suggested by them were never proved, the Recorder ought to have directed the jury that they must disregard them.

Bodkin and *Leycester*, for the prosecution. [They were requested by the Court to confine their argument to the point raised by the third ground of appeal, namely, whether the questions put to the appellant in cross-examination were admissible.] The appellant's evidence was in conflict with the entries in his books, and the questions were put in order to test, with regard to other entries, whether other transactions had been carried out with Mr. Dickins in the same way. Cross-examination as to the truth or falsity of an explanation is not contrary to the provisions of the Criminal Evidence Act, 1898. The questions were put with a view to testing the credibility of the appellant. *Chitson's Case* (2) shews that credibility is not the same thing as credit, i.e., character. If the questions tended to shew a system of fraud they were admissible: *Rex* v. *Bond*. (1) Counsel for the appellant in his opening speech raised the question of the prisoner's good character. Where there is a plan to defraud a person, evidence that the plan was carried out by defrauding that person in various ways may be given. The questions tended to shew the various phases of the plan and thus to prove its existence. All the cases with regard to which the questions were put could have been included in one indictment. The decision in *Blake* v. *Albion Life Assurance Society* (3) shews that, in order to prove that a particular person was the victim of a fraud, evidence of similar frauds committed against other persons may be given. Much more, therefore, may evidence be given of other similar frauds committed against the same person. Even if the questions were not strictly admissible, no substantial miscarriage of justice has occurred, and the Court can therefore dismiss the appeal under s. 4, sub-s. 1, of the Criminal Appeal Act, 1907. No objection was taken until question 2170, about the photograph, was asked. [*Rex* v. *Fisher* (4) was also referred to.]

Reginald J. White in reply. The questions were inadmissible as they related to frauds of an entirely different nature to that

(1) [1906] 2 K. B. 389.
(2) (1909) 2 Cr. App. R. 325.
(3) (1878) 4 C. P. D. 94.
(4) [1910] 1 K. B. 149.

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for which the appellant was being tried and tended to shew the general bad character of the appellant: *Rex* v. *Birdseye* (1); *Rex* v. *Girod* (2); *Rex* v. *Fisher*. (3)

Cur. adv. vult.

June 13. The judgment of the COURT (Lord Alverstone C.J., Jelf, Bray, A. T. Lawrence, and Lord Coleridge JJ.) was read by

BRAY J. In this case the appellant was indicted under six counts for obtaining moneys by false pretences from the late Mr. C. T. Dickins in respect of articles of virtù sold by him to Mr. Dickins. It was alleged that the articles had been sold by him to Mr. Dickins under an agreement that he was to charge Mr. Dickins the cost price plus 10 per cent. profit. The false pretences alleged were that he had represented to Mr. Dickins that the cost was much in excess of the real cost of the articles respectively, and that by this means he had obtained from Mr. Dickins much larger sums than he was entitled to. The jury acquitted him on counts 2 and 3, but convicted him on counts 1, 4, 5, and 6. We have now to give our reasons for our decision on all the points argued. We will deal first with those that we did not think it necessary to have argued before the larger Court. The first point raised by Mr. White, who appeared for the appellant and put his points most clearly and ably before us, related to the entries in the appellant's books. In all the six cases entries had been made in the books which apparently shewed the cost to him of the articles as well as the prices he charged Mr. Dickins. These entries were the evidence on which the prosecution relied as shewing the real cost, and if they in fact shewed the real cost it was clear that the appellant had obtained more from Mr. Dickins than he was entitled to. His case was that they shewed only part of the cost, and that he had paid more for the articles than the figures shewn in the books, and that he had only charged Mr. Dickins the actual sums he had paid plus 10 per cent. Mr. White urged that by their finding on counts 2 and 3 the jury had destroyed the presumption on which the prosecution had rested their case, that they had found in those

(1) (1830) 4 C. & P. 386. (2) (1906) 22 Times L. R. 720.
(3) [1910] 1 K. B. 149.

two cases that the entries in the books did not shew the whole cost, and that, if they did not shew the whole cost with regard to the articles mentioned in counts 2 and 3, there was no presumption that they shewed the whole cost of the articles mentioned in the remaining counts. We are of opinion that this argument is not sound. When the evidence is looked at it appears that there were good reasons why the jury should have accepted the appellant's explanation in the two cases and have rejected it in the others. The fact that there was a good explanation in the two cases would, no doubt, tend to weaken the presumption in the others, but would not destroy it. It was for the jury to decide the strength of the presumption.

The next point was that evidence as to certain civil proceedings which had been taken by the executors of the late Mr. Dickins against the appellant was wrongly admitted. It appeared that before any criminal proceedings had been taken the executors of Mr. Dickins had brought an action against the appellant for damages for fraud. The original statement of claim alleged fraud in the sale of a considerable number of articles not including any of those mentioned in the six counts, but this statement of claim was afterwards amended by including all the articles in the six counts. Evidence was given on the part of the prosecution that the case came on for trial; that the appellant was present on the first day, but not subsequently; that he was not called as a witness to deny the fraud, nor were any witnesses called on his behalf, and the verdict passed for the plaintiffs with large damages. It was further shewn that after the first day the appellant had gone abroad and had remained there till after the criminal proceedings were started. It appears to us that this evidence was admissible as shewing the conduct of the appellant when the charges were made against him. It is, as a rule, admissible to shew what is the conduct of a prisoner when he is charged with the offence alleged in the indictment. If he denies the charge, it is evidence in his favour; if he is silent, it may be evidence against him; if he admits it, it will be strong evidence against him. In this case it was suggested by the prosecution that his conduct in leaving the country instead of going into the witness-box to deny the charges was strong evidence against him. We are clearly of

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opinion that this conduct of his was evidence against him and properly admissible. It was none the less admissible because the charges of fraud were first made in civil proceedings. The value of this evidence was, of course, for the jury. It does not clearly appear that the prosecution put in all the proceedings. They would not, in our opinion, be entitled to have the part of the statement of claim which contained the other charges read to the jury, but that part was not read. It did appear what the verdict of the jury was, but that was sure to come out, and no objection was made. It did also appear that Grantham J., who tried the action, had ordered the documents to be impounded. This, no doubt, should not have been stated, but no objection was taken, and the matter is not one of sufficient importance in our opinion to justify an appeal. The real importance of the evidence given was the conduct of the appellant, and that we hold to have been clearly admissible.

We now come to the points argued before the larger Court. It was contended on the part of the appellant that questions had been put to him in cross-examination tending to shew that he had committed an offence other than that wherewith he was then charged in violation of the provision in s. 1, clause (*f*), of the Criminal Evidence Act, 1898, and that the appellant had been wrongly required to answer such questions, and, further, that the Recorder had wrongly directed the jury in his summing up that the evidence so given was relevant evidence which should be considered by them in forming their opinion as to whether the appellant was guilty of the offences charged. It appears that there was a second indictment, under which the appellant was charged with further frauds, which included the following:— (*a*) That he had obtained money from Mr. Dickins by falsely pretending that a certain china figure, described in an invoice sent to Mr. Dickins on July 17, 1900, as a figure of Countess Cozier, was a genuine piece of fine old Dresden china, and that he had acquired it on July 16, 1898, as a genuine piece of fine old Dresden china. (*b*) That he had committed a similar fraud in falsely representing that a certain china group, described in an invoice dated December 30, 1902, as a fine old Dresden group of two noblemen in masonic

costume dividing the globe, was a piece of genuine fine old Dresden china. This piece of china was referred to at the trial as a group of Peter the Great and Augustus the Strong pushing the world. The indictment was not, of course, before the jury, except indirectly, in the argument as hereinafter stated, and it is only now referred to as explaining the cross-examination. For the purpose of our judgment it is quite immaterial whether these frauds had been made the subject of another indictment or not. It was argued by Mr. White, the appellant's counsel, that questions were put to the defendant in cross-examination tending to shew that the defendant had committed these two frauds. It will be convenient to consider, first, what is the meaning of the words of the statute—"Any question tending to show that he has committed . . . . any offence," &c. It is plain that it must include many more questions than the simple question whether the prisoner has committed a particular offence. It is also plain that whether the question "tends to show" cannot be decided by looking merely at a single question. Each question must be judged by the light of others asked before and after. The object of the enactment is that it should not be suggested to the minds of the jury by means of any questions put to the prisoner that he has committed another offence. Any question or series of questions which would reasonably lead a jury to believe that it was being imputed to the prisoner that he had committed another offence would, in our opinion, tend to shew that the prisoner had committed that other offence. It does not in the least depend on the object of the counsel putting the question. The words of the Act are not "with a view to show," they are "tending to show." Moreover, if they do so tend, it is quite immaterial whether the evidence would be admissible or the question admissible on other grounds. As we read the statute, when a prisoner is charged with offence A, questions tending to prove offence B are not to be asked unless the proof of offence B is evidence of offence A. If it were otherwise the protection of the prisoner would be liable to be destroyed by a side wind. This disposes also of the proposition that the questions were admissible as going to the general credit of the witness. Nothing goes more to the general credit of a witness than a

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previous conviction; but no question tending to shew this is to be asked.

We will now refer to the questions that were put in the Countess Cozier case in order to see whether they come within our definition of the words "tending to show." They are questions 2056 to 2207. On examination of these questions it will be found that they are directed to prove the allegations necessary to shew that the appellant had committed this fraud. Questions 2056 to 2074 are directed to proving by means of entries in his own books that he bought this Countess Cozier from Hoffman on July 16, 1898, under the description "Figure of a Lady in crinoline and green cloak" for 30*l.* and sold it the same day to Mr. Dickins for 430*l.* under a much more elaborate description. This suggested a fraud. Then come questions 2076, 2077, and 2081. Now what is the meaning of these questions? What would they convey to a jury? Surely that he had bought a piece of china of little value from Hoffman for 30*l.* and had sold it to Mr. Dickins on a representation that it was the well-known Dresden china figure of Countess Cozier, the very false pretence charged in the second indictment. This line of cross-examination is followed up: "Q. 2088.—Do you tell the jury that you before that date, July, 1900, did not know of the Countess Cozier as a very important piece of Dresden china?" And when the appellant denied this, there come a number of questions, 2089 to 2097, directed to shew that the appellant was an expert, and must therefore have known of the existence of this well-known valuable piece of china, and that the article he sold was not that piece. Questions 2103 to 2113 are directed to shew that Hoffman, from whom he bought this piece, was also an expert and would never have sold such a valuable piece of china if it were genuine for 30*l.* We come now to question 2170. "Q.—This is a photograph, is it not, of the piece that you sold for 430*l.*?" It was at this point that Mr. Elliott interposed with an objection that the cross-examination was irrelevant and that it related to a fraud not in the indictment. It is most important to observe the answer of the Recorder to this objection. "Mr. Elliott: What possible bearing it has on any of the transactions named in the indictment I do not know. The Recorder: It is cross-

examination for the purpose of suggesting to the jury that there had been fraud in cases other than those set out in the indictment." This seems to us to make it quite clear how those questions were interpreted at the time, namely, as tending to shew that the appellant had committed another fraud in the sale of this Countess Cozier to Mr. Dickins for 430*l*. Applying the test we have indicated—namely, would these questions reasonably lead a jury to believe that it was being imputed to the appellant that he had committed this other fraud?—our answer must be that a jury would quite reasonably and properly take this same view. The objection was overruled by the Recorder and the cross-examination was allowed to proceed, and the appellant was asked to admit statements which Mr. Alfred Dickins had made in the witness-box at Bow Street when he was giving evidence in support of the charge in the second indictment, and the photograph and a pencil sketch, both of which had been put in evidence at Bow Street, were handed to the jury to shew that the appellant's explanation must be untrue. So much for the Countess Cozier fraud. Questions 2208 to 2255 relate to the Peter the Great and Augustus the Strong piece of china. It is unnecessary to go through these questions in detail. They are directed to shew by means of entries in his books that the appellant had bought the article for 30*l*. or perhaps 60*l*. from Woolman and had resold it to Mr. Dickins for 440*l*. Reading these questions and bearing in mind the questions put with reference to the Countess Cozier fraud, we come to the conclusion that these also "tended to show" that the appellant had committed another offence.

Now, if it be established, as we think it has been, that these questions, or some of them, tended to shew that the appellant had committed another offence, the statute provides that they shall not be asked or answered unless (1.) the proof that he has committed such other offence is admissible evidence to shew that he is guilty of the offence wherewith he is then charged, or (2.) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character or has given evidence of his own good character. We need not refer to the other cases in which the statute

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provides that such questions may be asked, as it was not suggested they were applicable here. Dealing first with (1.), was the proof that he had committed the Countess Cozier or Peter the Great frauds admissible evidence to prove the frauds with which he was then charged? In other words, could evidence of those frauds have been given by the prosecution? It was argued by Mr. Bodkin that the judgments in *Rex* v. *Bond* (1) supported his proposition. We think they shew the contrary. In his judgment Lord Alverstone C.J. said: "The general rule of law applicable in such cases can be clearly stated. It is that, apart from express statutory enactments, evidence tending to shew that the accused had been guilty of criminal acts other than those covered by the indictment cannot be given unless the acts sought to be proved are so connected with the offence charged as to form part of the evidence on which it is proved." Ridley J. agreed with this judgment, and Kennedy J. and Bray J. agreed with the principle so enunciated by Lord Alverstone C.J., so that four of the seven judges (a majority) laid down this principle; but when the other judgments are referred to, it will be seen that they differ not so much as to the principle, but as to the application of the principle to the facts of that case. In our opinion the law on this subject is laid down with perfect accuracy by Channell J. in *Rex* v. *Fisher*. (2) He said, in delivering the judgment of the Court of Criminal Appeal (Lord Alverstone C.J., Channell and Lord Coleridge JJ.), "In other words, whenever it can be shewn that the case involves a question as to there having been some mistake or as to the existence of a system of fraud, it is open to the prosecution to give evidence of other instances of the same kind of transaction, notwithstanding that the evidence goes to prove the commission of other offences, in order to negative the suggestion of mistake or in order to shew the existence of a systematic course of fraud." Then, applying those principles to the case he was dealing with, where the prisoner was charged with obtaining a pony and cart by making certain statements, he proceeded: "The falsity of these statements is not proved by giving evidence that in other cases the prisoner made other false

(1) [1906] 2 K. B. 389. (2) [1910] 1 K. B. 149.

statements, though it does tend to shew that the prisoner was a swindler. But there is no rule of law that swindling is, as regards proof, different from any other offence, and if a man is charged with swindling in a particular manner, his guilt cannot be proved by shewing that he has also swindled in some other manner. We are of opinion that the evidence as to the other cases was inadmissible in this case, because it was not relevant to prove that he had committed the particular fraud for which he was being charged, in that it only amounted to a suggestion that he was of a generally fraudulent disposition. On the other hand, if all the cases had been frauds of a similar character, shewing a systematic course of swindling by the same method, then the evidence would have been admissible." Safe similar fact evidence.

Applying these principles to the present case, we are of opinion that proof that the defendant had committed the Countess Cozier or the Peter the Great frauds is not admissible evidence that he was guilty of the frauds with which he was charged. As we have already pointed out, the frauds with which the defendant was charged were making false representations as to the cost price of the article and so obtaining from Mr. Dickins more than the cost plus 10 per cent. In the Countess Cozier and Peter the Great cases there had been no agreement by the defendant to charge only cost plus 10 per cent. The frauds were in representing the articles to be genuine old Dresden china when they were not so. The transactions were entirely distinct. The frauds were not of a similar character. There was no systematic course of swindling by the same methods. It was argued by Mr. Bodkin that there was some connection between one of the six cases in the indictment which was tried, namely, the Worcester cups case mentioned in count 4, and the Countess Cozier frauds, because in each case the article had been originally bought from Hoffman, and because in each case the entries in the books shewed payments to Hoffman. When the evidence is carefully looked at it will be seen that it is a fallacy to say that there was any connection between the two transactions. The prosecution were affirming, not denying, the entries in the books of payment to Hoffman, and the defendant was not suggesting any further payments to Hoffman, but to a different person altogether named

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Dopson. But, however that may be, the statute says that the test is to be whether the proof that he has committed such other offence is admissible evidence to shew that he is guilty of the offence charged. It is to be observed that at the end of the evidence the Recorder refused to allow evidence of the prosecution in reply as to the Cozier case, and so he shrank from saying that the evidence was proof of the charge in the indictment, which was the logical corollary of his admission of the cross-examination.

We come now to the second ground on which these questions might be properly put. Mr. Bodkin suggested that Mr. Elliott had in his opening speech to the jury endeavoured to establish the appellant's general good character. We do not think that this was so, but if it were so, that is not within the statute; he must have asked questions of the witnesses for the prosecution, or he must have given evidence with a view to establish the appellant's good character. It was said that in the examination-in-chief of the appellant Mr. Elliott had asked questions relating to his purchase of this business, to his general relations with Mr. Dickins, and to other transactions under the cost plus 10 per cent. agreement. In our opinion it would not be correct to say that the appellant had given evidence of his own good character. It may or may not have been relevant to go into other sales on the cost price plus 10 per cent. basis. Mr. Bodkin thought it was not and objected, and Mr. Elliott did not further pursue that line of examination, but its object was not to set up the appellant's good character, it was to negative fraud. In our opinion, if we were to give the slightest colour to the idea that a general examination as to the surrounding circumstances was such evidence of good character as to entitle the prosecution to prove or to cross-examine as to other offences or convictions, we should deprive the prisoner of the protection which the statute has given him. Sub-clause (ii.) of s. 1, clause (*f*), of the Criminal Evidence Act, 1898, was not intended to apply to a case like this. It was intended to apply to cases where witnesses to character were called, or where evidence of the good character of the prisoner was sought to be elicited from the witnesses for the prosecution. In civil actions evidence of good character is not, as a rule, admissible. It is admissible in criminal cases, and it is to this class of evidence

that the statute refers, not to mere assertions of innocence or repudiation of guilt on the part of the prisoner, nor to reasons given by him for such assertion or repudiation. The evidence given by the appellant here in examination-in-chief could not possibly have been objected to in a civil action as being "evidence of good character." It is to be observed that it never was suggested for a moment at the trial that the appellant had given evidence of good character, nor was it suggested by Mr. Bodkin on the first argument of this case. He said the point had occurred to him from reading Mr. Elliott's opening, but this, as we have pointed out, is not within the sub-section. Now these are the only two grounds on which the statute, so far as it is applicable to the cases now under consideration, permits cross-examination of the prisoner as to the commission of other offences. They both fail, in our opinion, and it follows that the questions put in cross-examination were not admissible.

But it was said that Mr. Elliott's objection came too late. Now it is true that he might have objected earlier, and no doubt this Court must be careful in allowing appeals on the ground of the reception of evidence that ought not to have been admitted when no objection has been made at the trial by the prisoner's counsel. Here, however, the objection was taken, though not at the earliest opportunity. It was argued on its merits and overruled, and the jury were informed not only when the objection was overruled, but afterwards in the summing up, that this evidence was relevant. No one was misled in the slightest degree by any delay in making the objection, and it would work a grave injustice if we were to refuse to allow the appeal here on the ground of some possible mistake on the part of the appellant's counsel. But there is another reason. The statute provides that the prisoner shall not be asked, and if asked shall not be required to answer, these questions. In our opinion these words were intended to afford a double protection to the prisoner. The statute provides that the question shall not be asked. The reason of this is plain, because in most cases the mischief is done by the asking of the question. The jury naturally assume that no such question would be put unless there was foundation for it, and the more

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objection is made to it by the prisoner's counsel, the stronger to their minds becomes that assumption. It is most damaging to the prisoner's case for his counsel to get up and argue that a question is inadmissible because it tends to shew that the prisoner has committed another crime. In this case, in order to make his objection clear, Mr. Elliott was obliged to tell the Recorder in the hearing of the jury that there was another charge pending against the appellant which was contained in another indictment. This of itself, unless removed by some clear statement from the Recorder that they must dismiss the question from their minds, must prejudice the jury. That is the reason, in our opinion, why the statute forbade the question even being asked. In our opinion it is the duty of the judge not to wait for any objection from the prisoner's counsel, but to stop such questions himself, and if by mischance the question be put, it is equally the clear duty of the judge to direct the jury to disregard it and not let it influence their minds.

There being, therefore, in our opinion, a clear misreception of evidence, it would have been unnecessary to consider whether there was also a misdirection in the summing up but for the fact that it was argued lastly that there had been no miscarriage of justice. This Court has laid down quite clearly the rule to be applied in cases of misreception of evidence or misdirection in law. It is stated by Channell J. in *Rex* v. *Fisher* (1) in these words : " In the circumstances of this case, we cannot come to any other conclusion but that the jury may have been influenced by the evidence of the other cases, and, therefore, although there was sufficient evidence to convict the prisoner without the evidence as to the other cases, in accordance with the rule laid down in this Court, the conviction cannot stand." Ought we to say here that the jury may have been influenced by these questions and answers ? A large part of the summing up was devoted to the stories of the Countess Cozier and Peter the Great fraud, whereas according to our view of the law the jury should have been told to dismiss these two matters from their consideration. The issue with regard to the charges in the indictment was a perfectly clear one. It was this : Were the

(1) [1910] 1 K. B. 149.

entries in the defendant's books to be taken to shew the whole cost, or did the defendant pay other sums? In other words, what credit was to be given to the defendant's evidence? Now the evidence as to these two other frauds was put before the jury as matter which they ought to take into consideration when they were deciding as to what credit should be given to the defendant's evidence. It is quite clear from the summing up that the jury were invited to consider whether these two cases were not very damaging to the defendant's credit, and that the jury could hardly have failed to draw an inference hostile to the defendant on the point. We feel bound, therefore, to say not only that the jury may have been influenced, but that they must have been influenced. On these grounds the Court is of opinion that the appeal must be allowed and the conviction quashed.

Conviction quashed.

Solicitor for appellant : *Julius A. White.*
Solicitor for prosecution : *Director of Public Prosecutions.*

J. E. A.

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April 19.

EDWARDS *v.* PHARMACEUTICAL SOCIETY OF GREAT BRITAIN.

Pharmacy Acts—Sale of Poison—Label—"Name" of Seller—Pharmacy Act, 1868 (31 & 32 *Vict. c.* 121), *s.* 17.

By s. 17 of the Pharmacy Act, 1868, "It shall be unlawful to sell any poison . . . . unless the . . . . bottle . . . . in which such poison is contained be distinctly labelled with the . . . . name and address of the seller of the poison . . . . and any person selling poison otherwise than is herein provided shall, upon a summary conviction . . . . be liable to a penalty . . . ."

A duly qualified chemist sold poison which was contained in a bottle labelled with his trade name but not with his personal name:—

Held, that the "name" of the seller mentioned in the section includes his trade name; that there had therefore been a sufficient compliance with the section; and that the chemist was not liable to the penalty imposed by it upon a person who sells poison contained in a bottle not labelled with the name of the seller.

Case stated by a metropolitan magistrate.

An information was preferred on behalf of the respondents, the Pharmaceutical Society of Great Britain, against Thomas Edwards, the appellant, for that he on October 19, 1909, at 36, Pitfield Street, Hoxton, N., did unlawfully sell to one George Waldock a certain poison, to wit, opium contained in a preparation of laudanum and soap liniment, which poison when sold was not distinctly labelled with the name of the seller contrary to the provisions of s. 17 of the Pharmacy Act, 1868.

At the hearing of the information the following facts were proved or admitted:—

The appellant was a duly qualified and registered chemist and druggist carrying on business at 36, Pitfield Street, Hoxton, under the name "Godfrey."

About sixteen years ago he purchased the goodwill of a chemist's business which was then and had been for some years carried on under the name "Godfrey" at 36, Pitfield Street, and he had since carried on the business under that name at the same place.

The name over the shop outside was "Godfrey, Dispensing

Chemist." The appellant's personal name, "Thomas Edwards," was on the certificate of qualification of the person by whom the business was conducted which was exhibited inside the shop as required by s. 3 of the Poisons and Pharmacy Act, 1908 (8 Edw. 7, c. 55).

On October 19, 1909, Waldock went to the appellant's shop at 36, Pitfield Street, and purchased on behalf of the respondents some laudanum and soap liniment, which was sold and handed to Waldock by the appellant in a bottle labelled with the name "Godfrey." Laudanum contains less than 1 per cent. of morphine and is therefore a poison included in Part II. of the schedule to the Poisons and Pharmacy Act, 1908.

The label was as follows:—

POISON.

Laudanum and Soap Liniment.

GODFREY, CHEMIST,
ESTAB. 1833
36, PITFIELD ST., HOXTON, N.
1, SOUTH STREET, NEW NORTH ROAD,
ISLINGTON, N.

It was contended on behalf of the appellant that as the bottle in which the liniment was sold was distinctly labelled with the name "Godfrey," that being the name under which he carried on the business, it was labelled with the name of the seller within the meaning of s. 17 of the Pharmacy Act, 1868, and that therefore the appellant was not guilty of the offence alleged.

It was contended on behalf of the respondents that the appellant had not complied with s. 17 of the Pharmacy Act, 1868, by labelling the bottle with the name "Godfrey" under which he carried on business, and that it ought to have been labelled with the appellant's personal name "Thomas Edwards" as the name of the seller, and the attention of the magistrate was

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directed to s. 13 of the Act of 1868 and the form in the schedule thereto for the purpose of registration under the Act.

The magistrate was of opinion that the name of the seller in s. 17 of the Pharmacy Act, 1868, means the personal name and not the trade name, and that the appellant had not complied with the section by labelling the bottle with the name "Godfrey" under which he carried on business as the name of the seller, and that therefore he was guilty of the offence with which he was charged, and the magistrate accordingly convicted him.

The question for the opinion of the Court was whether the magistrate came to a correct determination in point of law.

Danckwerts, K.C., and *H. D. Bonsey*, for the appellant. The magistrate was wrong. The "name" of the seller in s. 17 of the Pharmacy Act, 1868, means the name under which he sells. Any person may lawfully use a trade name. If a person who actually sold a poison were a member of a firm the firm would be the real seller, and if the decision of the magistrate is right, it would follow that the names of all the members of the partnership would have to be on the bottle. That could not have been intended. The magistrate placed the same limited construction upon the language of s. 17 as the House of Lords held in *Pharmaceutical Society* v. *London and Provincial Supply Association* (1) ought to be placed upon s. 15. But in giving judgment in that case Lord Selborne L.C. pointed out that s. 17 must be construed as being of universal application, whereas in s. 15 the word "person" bore a limited meaning. If the decision of the magistrate were upheld, it would to a great extent destroy the goodwill of the business of a chemist. The object with which s. 17 was enacted was to enable the seller to be quickly traced. If the name on the label is different from the trade name of the seller that object would be defeated. The trade name of the appellant was the proper name to be on the label: *Cameron* v. *Tyler* (2); *Berry* v. *Henderson*. (3) [*Templeman* v. *Trafford* (4) and the Poisons and Pharmacy Act, 1908, were also referred to.]

(1) (1880) 5 App. Cas. 857.
(2) [1899] 2 Q. B. 94.
(3) (1870) L. R. 5 Q. B. 296.
(4) (1881) 8 Q. B. D. 397.

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L. Sanderson, K.C., and *Glyn-Jones*, for the respondents. The word "name" of the seller in s. 17 of the Pharmacy Act, 1868, has the same meaning as the word "name" in s. 13 of that Act, which clearly means the actual personal name of the seller. If there were a partnership carrying on a chemist's business, all the members of the partnership being qualified, and one member sold a poison, the names of all the partners would have to appear on the label. The preamble to the Pharmacy Act, 1868, shews that the statute deals with the personal names of chemists and druggists which are to be entered in the register for which provision is made. Sect. 3, sub-s. 4, of the Poisons and Pharmacy Act, 1908, contains a special provision that if a chemist's business is carried on by a body corporate it must be under the control and management of a person whose name has been duly registered. The name of the seller which s. 17 of the Pharmacy Act, 1868, requires to be on the label is the name which appears in the register. *Cameron* v. *Tyler* (1) is distinguishable. The decision in that case turned upon the construction of the Weights and Measures Act, 1889 (52 & 53 Vict. c. 21). In that statute there is nothing which prohibits a trader using his trade name for the purposes of selling coal. The Pharmacy Act, 1868, does not wholly prevent chemists using a trade name, but if they sell poisons they must comply with the provision of the Act as to placing their own name on the label of the bottle containing the poison. The object of the provision is to enable the seller to be immediately traced. That can be done if his personal name and private address are on the label. Sect. 3, sub-s. 1, of the Poisons and Pharmacy Act, 1908, requires the name of the person conducting the business to be conspicuously exhibited on the premises, and the Pharmacy Act, 1868, ought to be construed by the light of the Act of 1908.

Danckwerts, K.C., in reply.

LORD ALVERSTONE C.J. This case is not free from difficulty, but in my judgment the decision of the magistrate was wrong. It is necessary to consider the purview and object of s. 17 of the

(1) [1899] 2 Q. B. 94.

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Lord Alverstone C.J.

Pharmacy Act, 1868, and we must construe that section without reference to what is contained in the Poisons and Pharmacy Act, 1908, although, speaking for myself, in my opinion the Act of 1908 confirms the view which has been placed before us on behalf of the appellant. In my judgment s. 17 of the Pharmacy Act, 1868, was enacted with a view to protecting the public with regard to the sale of poisons. The language of the first portion of the section is: "It shall be unlawful to sell any poison, either by wholesale or by retail, unless the box, bottle, vessel, wrapper, or cover in which such poison is contained be distinctly labelled with the name of the article and the word poison, and with the name and address of the seller of the poison; . . . . and on every sale of any such article the seller shall, before delivery, make or cause to be made an entry in a book to be kept for that purpose stating in the form set forth in Schedule (F) to this Act, the date of the sale, the name and address of the purchaser, the name and quantity of the article sold, and the purpose for which it is stated by the purchaser to be required, to which entry the signature of the purchaser and of the person, if any, who introduced him shall be affixed . . . ." I have read that portion of the section in order to point out that the acts which it requires to be performed must be done at the address where the poison is sold. The book has to be kept there, and must be signed by the purchaser at the time of sale. This has an important bearing on the contention of Mr. Sanderson on behalf of the respondent that because the name and place of residence in the certificate of the person conducting the business of a chemist have by the Act of 1908 to be put up in the shop, the same construction must be placed on s. 17 of the Act of 1868. But the address in the certificate which by the Act of 1908 has to be in the shop need not be and in some cases would not be the same address as that at which the poison is sold; for the Act of 1908 provides that a man shall give his place of residence as well as his name for the purpose of registration, and it is not disputed that the address of the shop is not of necessity the same address as that in the register of qualified persons. Sect. 17 of the Act of 1868 continues: "for the purposes of this section the person on whose behalf any sale is made by any

apprentice or servant shall be deemed to be the seller." It then proceeds to deal with certain exceptions with regard to medicines exported or sold wholesale to retail dealers as follows: "but the provisions of this section, which are solely applicable to poisons in the first part of the Schedule (A) to this Act, or which require that the label shall contain the name and address of the seller, shall not apply to articles to be exported from Great Britain by wholesale dealers, nor to sales by wholesale to retail dealers in the ordinary course of wholesale dealing, nor shall any of the provisions of this section apply to any medicine supplied by a legally qualified apothecary to his patient, nor apply to any article when forming part of the ingredients of any medicine dispensed by a person registered under this Act; provided such medicine be labelled in the manner aforesaid, with the name and address of the seller, and the ingredients thereof be entered, with the name of the person to whom it is sold or delivered, in a book to be kept by the seller for that purpose . . . ." If I were to read that section without reference to earlier sections, I should have no doubt that it contemplates a contract of sale by or on behalf of a person selling. It contemplates the label being put on and the book being entered up at the shop or address where the poison is sold, so that the sale of the poison can be traced, and it also contemplates that the real seller shall be the person whose name shall be put upon the label with the word "poison." It is said, however, that if you look at the earlier sections of the Act they are contrary to this view, and that the name on the label must be the name which is entered upon the register, which need not be the name on the shop but must be the name of a person who has passed the examinations and who is subject to the provisions of the Act, and that it was for that reason that the House of Lords held in *Pharmaceutical Society* v. *London and Provincial Supply Association* (1) that a corporation could not be liable to a penalty under s. 15. How would you construe s. 17 apart from any argument based on the other sections? The Legislature could not have overlooked the fact that persons constantly carry on business under other names than their own, and the business may have been so carried on

(1) 5 App. Cas. 857.

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for generations though there may have been no one of that name connected with the firm. Therefore, when persons who are trading under a trade name have made a contract of sale, it is right to say that the name of the seller for the purposes of s. 17 is the name under which the seller is trading. I am unable to come to the conclusion that where a trade name is put up and used by a person at an address, that name and address are not the name and address of the seller within the meaning of that section, and my view is strongly supported by the fact that if a mere agent sells it is not his name which has to be put on the label, but that of the person on whose behalf the sale is made, who is to be deemed to be the seller. It is said by Mr. Sanderson on behalf of the respondent that the language of Lord Selborne L.C. in the House of Lords so far as his judgment deals with the point this Court has to decide is obiter and is not binding upon us. I agree that it is not binding upon us, but having regard to the substance of his reasoning I think he did seriously consider s. 17. He said: "My Lords, if you look through the Act it will be found, that there is only one place where it seems to be necessary to put upon the word 'person' a wider sense; and that occurs in a clause which is in several respects contrasted with the rest of the provisions of the Act, I mean the 17th section. It begins with a general prohibition in unequivocal terms; not 'it shall be unlawful for any person,' &c., or 'for any person not coming within a certain definition;' but 'it shall be unlawful to sell,'—unlawful generally, absolutely, and unequivocally,—'to sell any poison either by wholesale or by retail,' as to which certain precautions are not observed. That form of prohibition is repeated twice. First, as to all poisons whatsoever, and then, four lines afterwards, as to certain particular kinds of poison,—'it shall be unlawful to sell' to any person unknown to the seller, &c. That is a universal prohibition, not qualified by any exception as to any description of person; though, no doubt, the thing is only made unlawful, if done otherwise than in a certain manner and without the observance of certain conditions. The penalty, also, imposed by that section, is not (like that under the 15th section) a civil debt, to be recovered by a civil form of proceeding or action,

though incurred by what is called an 'offence'; but it is a penalty to be recovered 'upon a summary conviction before two justices of the peace.' The words are added: 'and for the purposes of this section, the person on whose behalf any sale is made by any apprentice or servant shall be deemed to be the seller.' The thing being made universally unlawful, 'person' must, I think, there include a corporation, if the sale is made by any apprentice or servant on behalf of a corporation." Quite apart from authority that is reasoning which I cannot answer, and I am bound to follow it as it concurs with my own opinion. It is a distinct decision that at that time a corporation could be a seller and could be liable to a penalty under s. 17 although a corporation could not be examined and put on the register. Lord Blackburn's opinion in that case, although more shortly expressed, was to the same effect. He said: "Then is there anything in the context or anything in the object of the Legislature which requires that although the word 'person' would not so properly include a corporation, yet in this particular case we should extend it and make it include a corporation? I think there is not in this section. In s. 17, which has been alluded to, there is sufficient reason for doing so, but in ss. 1 and 15 I think there is not." That is a decision given long before 1908 which, if binding upon us, shews that a corporation can be a seller within s. 17 of the Act of 1868 and is bound to carry out all the provisions of that section, including the obligation to put on the label the name and address of the seller. What name and address is it bound to put on? It must put on the name and address of the corporation. As to the Poisons and Pharmacy Act, 1908, and to the safeguards under it, a corporation must have a superintendent, and if he is not qualified it must have a qualified assistant whose name must be put up in the shop. If it had been intended to substitute for the name of the seller the name of the person responsible for the conduct of the business we should have found it in the Act. In this particular case Edwards was "Godfrey" and Edwards was the name on the certificate in the shop, and therefore it would not make so much difference, but it might very well be that the name in the certificate would be only that of an assistant

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and would not of necessity be the name of the person on whose behalf the thing was sold. The long series of coal cases under the Weights and Measures Acts strongly supports the view I have expressed. I agree that there may be reasons for a stricter interpretation of statutes relating to the sale of poisons than those relating to the sale of coal. Where there have been breaches of the provisions of those Acts which impose restrictions on the sale of coal we have pointed out that those restrictions were inserted to protect the poor and to make it possible to trace a seller who has been guilty of fraud. We have decided that the insertion of the trade name of the seller of coal is a compliance with the statute which says that there must be a delivery order shewing the name of the seller. I think, therefore, that in order to give full effect to s. 17 of the Pharmacy Act, 1868, it is necessary to read the word "seller" as the de facto seller, and if he is carrying on business as "Godfrey" and sells in that name it is a sufficient compliance with s. 17 to put on the label the name Godfrey with his business address. I therefore think that the magistrate was wrong; he was to a large extent influenced by s. 13, and that was wrong because the requirements of s. 13 are for an entirely different purpose.

BRAY J. I am of the same opinion. Sect. 17 of the Pharmacy Act, 1868, says that a vessel containing any poison must be distinctly labelled with the name of the article and the word "poison" and with the name and address of the seller, but the section does not specify what particular name and what particular address are to be given. It is notorious that many persons have two addresses, and it often happens that they have two names. The section does not state that the registered name and address are to be given, and therefore we have to say whether the name and address which were put on the label in this case were the name and address of the seller. Who is the seller? The seller is not the person who happens to be in the shop, but the person on whose behalf the thing is sold and may be a corporation; the seller is the person who is carrying on the business. Here "Godfrey" was carrying on the business. That was the name in which the business was being carried on, and was the name

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over the shop and the name in which no doubt all the books were kept and in which all the invoices and notices were made out. In those circumstances it seems to me that it can properly be said that Godfrey was the name of the seller. Is there anything in the Pharmacy Act, 1868, which obliges us to hold that the words "name and address" in s. 17 have some special and particular meaning? It is said that this Act means that the seller shall have a certificate that he is a competent person, but according to the decision in *Pharmaceutical Society* v. *London and Provincial Supply Association* (1) the word "person" in s. 17 includes a corporation, and in my opinion s. 17 is not directed to ascertain the competency of the person selling. The object is to enable the poison to be traced and to find the person who sold it. It seems to me that the trade name and address of the seller are at least as good for that purpose as the private name and address. It is not necessary to say whether the private name and address of the seller, if stated on the label, would be sufficient, but my view is that the private name and address would equally satisfy the words of the section. Any name and address that are known as the name and address of the seller are sufficient. For these reasons I think that we ought to come to the conclusion that the magistrate was wrong.

PICKFORD J. I do not feel quite so clear about the matter as the other members of the Court, but I do not dissent.

Appeal allowed.

Solicitors for appellant: *Neve, Beck & Kirby.*
Solicitors for respondents: *Flux, Thompson & Quarrell.*

(1) 5 App. Cas. 857.

J. E. A.

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July 23.

PRESTED MINERS COMPANY, LIMITED *v.* GARNER, LIMITED.

Sale of Goods—Contract not to be performed within a Year—Writing signed by the Party to be charged—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4—*Sale of Goods Act*, 1893 (56 *& 57 Vict. c.* 71), *s.* 4.

Sect. 4 of the Statute of Frauds (so far as it relates to agreements not to be performed within a year) applies to agreements for the sale of goods and is not repealed by the Sale of Goods Act, 1893. Therefore an agreement for the sale of goods is not taken out of the operation of the above provision of the Statute of Frauds by reason of there having been acceptance and actual receipt by the buyer of part of the goods so sold.

Action tried in the Commercial Court before Walton J. without a jury.

The plaintiffs claimed (*a*) a declaration that the defendants should execute a memorandum of agreement in the terms set out in the indorsement of the writ, of which the following were the material clauses:—(1.) The defendants to appoint the plaintiffs sole agents for the sale of H.P. carburettors made under Huggins & Parker's patents in consideration of the plaintiffs ordering and taking a minimum of 500 carburettors from April 4, 1910, to April 4, 1911. (2.) A minimum of 500 carburettors to be ordered by the plaintiffs per annum, thirty-five to be ordered as from the date of agreement. (3.) The price per carburettor to be 3*l.* No. 1 size and 3*l.* 15*s.* No. 2 size. (8.) The plaintiffs to spend 250*l.* per annum in advertising, plaintiffs to produce receipts for payments of such advertising to the defendants at their request. (9.) If the plaintiffs order a minimum of 500 carburettors from April 4 in any one year to April 4 in any subsequent year the plaintiffs to be at liberty to continue the agreement for a further year on giving notice. (12.) All carburettors to be paid for by the plaintiffs by bills drawn by the defendants upon the plaintiffs and indorsed by one director of the plaintiff company, such bills to be accepted and indorsed on the third day of the month following delivery of goods and statements and payable six weeks from that date. (13.) The defendants guarantee best workmanship and finish and

to repair defects arising within twelve months from delivery free of cost on carriage being paid.

The plaintiffs claimed alternatively (*b*) a declaration that an agreement was entered into on April 4, 1910, between the plaintiffs and the defendants and was binding upon them; (*c*) specific performance of the agreement; (*d*) damages.

The defendants gave notice of special defence, which so far as material was as follows: "At the trial of this action defendants will object that the provisions of s. 4 of the Statute of Frauds (29 Car. 2, c. 3) have not been complied with. So far as concerns the Statute of Frauds the objection is that the alleged agreement is one which was not to be performed within the space of one year from the making thereof."

It appeared that on April 4, 1910, an interview took place between Mr. Prested, the managing director of the plaintiff company, and Mr. Garner, the managing director of the defendant company, and their respective solicitors, at which the terms of a proposed agreement were discussed and certain memoranda were made by the solicitors, from which the agreement was to be prepared. It was also agreed that the defendant company should make inquiries into the financial position of the plaintiff company, and that Mr. Garner should be satisfied before an agreement in writing which at the conclusion of the interview it was agreed that the defendants' solicitor should draw up in accordance with the terms agreed at the interview should be signed. The defendants' solicitor accordingly drafted a proposed agreement, but in consequence of the disputes with regard to the draft hereinafter mentioned the agreement was not signed and the present action was commenced.

The defendants alleged that in addition to the clauses above set out they were entitled to have certain other provisions inserted in the written agreement as not being incompatible with the terms agreed upon at the interview of April 4, and their solicitor inserted these additional provisions in the draft agreement. The plaintiffs objected to these provisions, alleging that they were outside the terms so agreed upon, and at the trial Walton J. found as a fact in favour of the plaintiffs on this issue. At the trial the defendants gave evidence to the effect

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that Mr. Garner was not satisfied with the plaintiffs' financial position, and contended that upon that ground they were not bound to carry out the agreement arrived at on April 4, but Walton J. found as a fact that the defendants had not taken up this position before the trial. He therefore held that they were not entitled to repudiate the agreement of April 4 on that ground.

The question of law to which this report relates is whether the objection raised by the special defence was good. It was assumed for the purpose of the arguments (it being agreed that the assumption was made for the purpose of the arguments before Walton J. only and was not to bind the plaintiffs in the event of an appeal) that the agreement arrived at at the interview of April 4 was for the sale of goods not to be performed within a year.

Leslie Scott, K.C. (*Valetta* with him), for the plaintiffs. There is no authority to the effect that a contract for the sale of goods which is enforceable under s. 4 of the Sale of Goods Act, 1893, by reason of there having been acceptance and actual receipt of part of the goods sold is rendered unenforceable by s. 4 of the Statute of Frauds (1) by reason of the agreement, although not to be performed within a year, not being in writing. As part of the goods in the present case was accepted and actually received, no writing was required under s. 4 of the Sale of Goods Act, 1893. If a contract of sale is enforceable under s. 4 of the Sale of Goods Act, 1893, it is outside the Statute of Frauds, and it is therefore immaterial whether it is to be performed within a year or not. The judgment of Abbott J. in *Bracegirdle* v.

(1) Statute of Frauds, s. 4: "No action shall be brought whereby . . . . to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

Sale of Goods Act, 1893, s. 4, sub-s. 1: "A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, ..."

Heald (1) so far as it appears to assume that a contract for the sale of goods could be within s. 4 of the Statute of Frauds is obiter. [*Donellan* v. *Read* (2), *Abbott & Co.* v. *Wolsey* (3), *Reeve* v. *Jennings* (4), and the Sale of Goods Act, 1893, s. 3, were also referred to.]

Bailhache, K.C., and *J. B. Matthews*, for the defendants. The language of s. 4 of the Statute of Frauds referring to agreements not to be performed within a year from the making thereof is perfectly general, and there is no authority in support of the contention that it does not apply to a contract for the sale of goods. As the contract in the present case was not to be performed within a year and was not in writing, it is directly within the words of s. 4 of the Statute of Frauds, and the fact that part of the goods was accepted and received is immaterial. The equitable doctrine of part performance only applies to land. Therefore the absence of writing renders the contract incapable of being enforced by action: *Britain* v. *Rossiter* (5); *Ex parte Acraman*. (6) [Leake on Contracts, 5th ed., p. 170, and Smith's Leading Cases, 10th ed., vol. 1, p. 305, were also referred to.]

Leslie Scott, K.C., in reply. By the Sale of Goods Act, 1893, s. 17 of the Statute of Frauds as amended by the Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14) (commonly called Lord Tenterden's Act), was repealed. Sect. 4 of the Sale of Goods Act, 1893, is a re-enactment of s. 17 of the Statute of Frauds as amended by Lord Tenterden's Act. It is improbable that a contract which satisfies the requirements of one section of a statute (namely, s. 17 of the Statute of Frauds) should be made unenforceable by another section in the same statute. The true construction of s. 4 of the Sale of Goods Act, 1893, is that, if it is complied with, the contract is enforceable.

But apart from the question of construction, the contract in the present case is taken outside the Statute of Frauds by reason of there having been part performance. The object of the Statute of Frauds was to prevent fraud, and the opinion expressed by

(1) (1818) 1 B. & Al. 722.
(2) (1832) 3 B. & Ad. 899.
(3) [1895] 2 Q. B. 97.
(4) [1910] 2 K. B. 522.
(5) (1879) 11 Q. B. D. 123.
(6) (1862) 31 L. J. (Ch.) 741.

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Kay J. in *McManus* v. *Cooke* (1) that the equitable doctrine of part performance has not been confined to contracts for the acquisition of an interest in land was right and ought to be upheld. [*Brogden* v. *Metropolitan Ry. Co.* (2) and the Sale of Goods Act, 1893, s. 61, were also referred to.]

WALTON J., after dealing with the questions of fact, continued :— The defendants say that there was no contract in writing sufficient to satisfy s. 4 of the Statute of Frauds. That section is not repealed by the Sale of Goods Act, 1893, although s. 17 of the Statute of Frauds as amended by Lord Tenterden's Act is repealed by the Sale of Goods Act, 1893, and replaced by s. 4 of that Act.

On behalf of the plaintiffs it was contended that s. 4 of the Statute of Frauds does not apply to a contract for the sale of goods, but that the matter is governed wholly and exclusively by s. 4 of the Sale of Goods Act, 1893, and that if a contract for the sale of goods is brought within s. 4 of the Sale of Goods Act, 1893, or (what is in substance the same thing) within the language of s. 17 of the Statute of Frauds as amended by Lord Tenterden's Act, it is not within s. 4 of the Statute of Frauds. It was assumed (but only for the purpose of the arguments before me and not as in any way constituting an admission by the plaintiffs) that the agreement upon which this action was brought was an agreement which was not to be performed within the space of one year within the meaning of s. 4 of the Statute of Frauds. Although the agreement comprised other matters it was essentially an agreement for the sale of goods upon certain terms and conditions. The question for my decision is whether s. 4 of the Statute of Frauds applies to an agreement for the sale of goods. There is no direct express authority on the point, but from the text-books, including those of such authority and standing as Smith's Leading Cases and Leake on Contracts (I refer to pp. 219 and 220 of the 3rd edition of that book, which was published in the lifetime of Mr. Leake), it appears that it has always been assumed that an agreement for the sale of goods may be within s. 4 of the Statute of Frauds, and I so hold.

(1) (1887) 35 Ch. D. 681. (2) (1877) 2 App. Cas. 666.

In my judgment this agreement is within s. 4 of the Statute of Frauds, and that section, notwithstanding anything in the Sale of Goods Act, 1893, governs this case. On that ground, and on that ground only, I hold that this action cannot succeed.

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Judgment for defendants.

Solicitors for plaintiffs: *Coleman & Coleman.*

Solicitors for defendants: *Dennison, Horne & Co., for E. S. Taylor, Birmingham.*

J. E. A.

[IN THE COURT OF APPEAL.]

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July 5.

ROSEFIELD *v.* PROVINCIAL UNION BANK.

Bill of Sale—Payment by Instalments—Equal Monthly Payments in respect of both Principal and Interest—Construction of Statutory Form—Bills of Sale Act, 1878, *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9.

By a bill of sale goods were assigned to the grantee to secure an advance of 30*l.* made by him to the grantor, with interest thereon at the rate of 10*d.* in the 1*l.* per month, and the grantor further agreed and declared that he would pay to the grantee the principal sum aforesaid, together with the interest then due, by monthly payments of 2*l.* on the 9th day of every month succeeding the date of the bill of sale, the first payment to be made on the 9th day of November then next, and that, in default of payment of any instalment of the said principal sum, he would pay interest on such instalment at the rate aforesaid from the date when the same should become due until payment thereof. The real bargain between the parties was that the payment of both the principal and the interest should be made by monthly payments of 2*l.*:—

Held (by Vaughan Williams L.J. and Buckley L.J., Fletcher Moulton L.J. dissenting) that, upon the true construction of the bill of sale, it expressed the real bargain between the parties, and that it was not void as not being in accordance with the form in the schedule to the Bills of Sale Act, 1878, Amendment Act, 1882.

Goldstrom v. *Tallerman*, (1886) 18 Q. B. D. 1, discussed.

APPEAL from an order made by Bray J. at chambers, refusing to continue an injunction as after mentioned.

The action was brought by the plaintiff against a person who carried on business under the name of the Provincial Union Bank

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in respect of a seizure of goods at the plaintiff's residence by the defendant under a bill of sale given to the defendant by the plaintiff, and claimed (1.) an injunction ordering the defendant to retire from possession of the plaintiff's goods at his residence; (2.) an injunction restraining the defendant, his servants or agents, from trespassing on the plaintiff's premises, or removing from them the said goods, furniture, chattels, and effects; (3.) a declaration that the bill of sale was void, and an order setting aside and cancelling the same; (4.) damages for trespass.

The bill of sale, so far as material, was as follows: "This indenture made" &c. "witnesseth that, in consideration of the sum of 30*l.* now paid to the grantor by the grantee . . . . the grantor doth hereby assign unto the grantee . . . . all and singular the several chattels and things specifically described in the schedule hereto annexed, by way of security for the payment of the sum of 30*l.* and interest thereon at the rate of tenpence in the pound per month, and the grantor doth further agree and declare that he will duly pay to the grantee the principal sum aforesaid, together with the interest then due, by monthly payments of 2*l.* on the 9th day of every month succeeding the date of these presents, the first payment to be made on the 9th day of November next, and that, in default of payment of any instalment of the said principal sum, he will pay interest on such instalment at the rate aforesaid from the date when the same shall become due until payment thereof." Then followed covenants for insurance and other covenants for the maintenance of the security, and a proviso that "the chattels hereby assigned shall not be liable to seizure or be taken possession of by the grantee for any cause other than those specified in s. 7 of the Bills of Sale Act, 1878, Amendment Act, 1882." The goods comprised in the bill of sale having been taken possession of by the defendant for default by the plaintiff thereunder, the action was brought as above mentioned, and the plaintiff applied ex parte at chambers for an interim injunction on the ground that the bill of sale was void to Scrutton J., who granted an injunction to restrain the defendant from sale or removal of the goods seized till a certain date, in order that the plaintiff might serve on the defendant a summons for that date for a continuance of the

injunction. This was accordingly done, and the case came before Bray J. at chambers, when the parties agreed to treat the application as the trial of the action. It appeared from the affidavits used on the application, and was admitted by the parties, that the bargain made between them was that the plaintiff should pay the sum borrowed and interest by payments of 2*l.* per month, which was to include interest, and receipts given for payments made by the plaintiff shewed that this arrangement had been carried out previously to his falling into arrear. Bray J. refused to continue the injunction and gave judgment in the action for the defendant, but gave leave to appeal.

The plaintiff thereupon gave notice of appeal upon the following grounds:—1, That the learned judge was wrong in law in holding that the bill of sale relied on by the defendant was in accordance with the form in the schedule to the Bills of Sale Act, 1878, Amendment Act, 1882; 2, that the meaning of the covenant for repayment in the bill of sale was that the plaintiff was bound to pay 2*l.* off the principal and in addition the interest then due on the 9th of each month; 3, that the learned judge was wrong in holding that the covenant in the bill of sale meant that the plaintiff was bound to pay 2*l.* on the 9th of each month, which included principal and interest; 4, that the learned judge was wrong in law in not holding that the real bargain between the parties was not set out in the bill of sale; 5, that the bill of sale was subject to a condition that it should be satisfied by the payment of 2*l.* and interest on the 9th day of each month; 6, that the learned judge was wrong in law in not holding that the bill of sale was so ambiguous as to be contrary to the form in the schedule to the Bills of Sale Act, 1878, Amendment Act, 1882.

Ritter (*G. H. Condy* with him), for the plaintiff. The bill of sale in this case is void on several grounds. It is bad for ambiguity, and is not in accordance with the form in the schedule to the Bills of Sale Act, 1882. The first part of the clause which sets forth the obligation of the borrower in regard to repayment of the loan is in the words of the statutory form, but, having regard to the terms of the default clause which

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follows, it is almost impossible to say with certainty what is the meaning of the bill of sale. In *Goldstrom* v. *Tallerman* (1) it was held that the true construction of the statutory form is that the instalments or equal payments therein mentioned are to be payable in respect of principal only. But, if this is the true construction of the words in this bill of sale, then it is bad as not representing the true bargain between the parties, which was that the borrower should only pay 2*l.* per month in respect of both principal and interest. Again, if the opposite is the true construction, then it would appear from *Goldstrom* v. *Tallerman* (1) that the bill of sale is not in accordance with the statutory form. Upon the terms of the default clause in this case it is extremely difficult to say whether the monthly instalment of 2*l.* is to be payable in respect of principal only, or of principal and interest. Scrutton J. appears to have been of opinion that the bill of sale was bad because the default clause provided for the payment of compound interest. The object of the Legislature, in providing by s. 9 of the Bills of Sale Act, 1882, that bills of sale must be in accordance with the statutory form, was that the obligation of the borrower should be clearly defined, and that he should not be placed at a disadvantage in dealing with unscrupulous persons through not being able exactly to ascertain what his liability under the bill of sale might be. This bill of sale is capable of two different meanings, and leaves it uncertain whether the payment of 2*l.* per month is in respect of principal only, or in respect of principal and interest. On the construction contended for by the defendant, it would be most difficult, especially in the event of any default, for the borrower to ascertain for what amount he was liable under the bill of sale. [He cited *Pettit* v. *Lodge & Harper* (2); *Curtis* v. *National Bank of Wales* (3); *In re Bargen, Ex parte Haslück.* (4)]

Danckwerts, K.C., and *J. B. Matthews*, for the defendant. Upon its true construction, the bill of sale corresponds with the real bargain made between the parties, which was that the instalments of 2*l.* were to cover both principal and interest.

(1) 18 Q. B. D. 1.
(2) [1908] 1 K. B. 744.
(3) (1889) 5 Times L. R. 338.
(4) [1894] 1 Q. B. 444.

It is clear from what was said by Lord Halsbury L.C. in *Simmons* v. *Woodward* (1), and by Lindley L.J. in *Linfoot* v. *Pockett*.(2), that, so construed, the bill of sale would not be otherwise than in accordance with the statutory form. The mere fact that a bill of sale might to some persons appear ambiguous is no ground for holding it void, provided that it is reasonably capable of a legal construction. If a bill of sale were so ambiguous as to be unintelligible, then, no doubt, it might be void.

[VAUGHAN WILLIAMS L.J. Do you contend that no amount of ambiguity, short of being legally unintelligible, would make a bill of sale void ?]

It is not necessary for the purpose of the defendant's case to go so far as that. It may be a question of degree. In this case there is no such ambiguity as to render the bill of sale void. Upon a fair construction of the words of the bill of sale according to their natural meaning, it is reasonably clear that the payments of 2*l.* are in respect of principal and interest, and the default clause only makes interest payable in respect of so much of the 2*l.*, in payment of which the borrower makes default, as represents principal. In *Edwards* v. *Marston* (3) it was stated by Lord Esher M.R. and Kay L.J. that it was not intended in the judgment in *Goldstrom* v. *Tallerman* (4) to lay down any general rule in regard to the construction of the words of the statutory form, but only to determine their construction with regard to the facts of the particular case. [They also cited *Weardale Coal and Iron Co.* v. *Hodson* (5) and *Haslewood* v. *Consolidated Credit Co.* (6)]

Ritter, for the plaintiff, in reply.

VAUGHAN WILLIAMS L.J. The questions which arise in this case are with reference to a bill of sale, which was given to secure money lent by the defendant to the plaintiff. The plaintiff having made default in payment according to the terms of the bill of sale, the defendant entered into possession of the goods therein mentioned. The plaintiff having thereupon brought this

(1) [1892] A. C. 100, at p. 107.
(2) [1895] 2 Ch. 835, at p. 846.
(3) [1891] 1 Q. B. 225.
(4) 18 Q. B. D. 1.
(5) [1894] 1 Q. B. 598.
(6) (1890) 25 Q. B. D. 555.

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action, an application was made ex parte to Scrutton J. for an interim injunction to restrain the defendant from proceeding to realize his security, and from remaining in possession of the goods; and an order was thereupon made which granted an injunction for a limited time, leaving it therefore necessary for the plaintiff to apply for a continuation of that injunction, if he wished it to be continued. An application for the continuation of the injunction came before Bray J., who refused to continue it, and the plaintiff has appealed against that refusal. The parties have agreed that the hearing of this application shall be treated as the trial of the action. In the affidavit filed in support of the application for an injunction there are certain paragraphs, which give the details of the real bargain between the parties, and it is common ground that the details so given are correct. The importance of that is that, if a particular construction is put upon this bill of sale, it is not consistent with what is agreed to have been the real bargain made between the parties. The notice of appeal asks that the decision of the learned judge should be set aside upon the following grounds. [The Lord Justice then read the grounds stated in the notice of appeal as above mentioned.]

I now propose to read the material clauses of the bill of sale. It witnesses that, "in consideration of the sum of 30*l.* now paid to the grantor by the grantee . . . . the grantor doth hereby assign unto the grantee . . . . all and singular the several chattels and things specifically described in the schedule hereto annexed, by way of security for the payment of the sum of 30*l.* and interest thereon at the rate of tenpence in the pound per month; and the grantor doth further agree and declare that he will duly pay to the grantee the principal sum aforesaid, together with the interest then due, by monthly payments of 2*l.* on the 9th day of every month succeeding the date of these presents, the first payment to be made on the 9th day of November next." Now it appears to me that, whatever objection might have been taken to that clause at the time immediately after the passing of the Bills of Sale Act, 1882, it is common ground on both sides that, if it had stood alone, it is now, having regard to the decisions which have been given since the passing of the Act, impossible

to object to that clause taken by itself. The bill of sale proceeds as follows: "and that, in default of payment of any instalment of the said principal sum, he will pay interest on such instalment at the rate aforesaid from the date when the same shall become due until payment thereof."

It appears to me that it is really the provision in the clause I have just read, upon which the argument for the plaintiff is based, and which is referred to in the notice of appeal, which gives as grounds of appeal that the learned judge was wrong in holding that the bill of sale, including this default clause, was in accordance with the form in the schedule to the Bills of Sale Act, 1882, and in not holding that it was so ambiguous that it ought to be treated as void on account of its ambiguity. The other point taken, which I have already mentioned, is that the bill of sale was not in accordance with the actual bargain between the parties.

It has been suggested with regard to the construction of this bill of sale that, if you read the clause which sets forth the obligation of the borrower, including the default clause, the result is that, according to its true construction, the bill of sale provides that interest is to be paid upon interest. It was not argued, however, I think, before us that it provided for payment of compound interest, but it was mentioned that Scrutton J. appears to have supposed that it did, or that, at any rate, it provided for payment of interest in addition to the amount payable under the previous words of the obligation clause.

These being the grounds of the appeal, we have to consider whether there is anything in this bill of sale which affords good ground for avoiding it.

Speaking for myself, I should certainly say that, if the Legislature intended that a bill of sale should state clearly and with certainty on the face of it what the obligation imposed on the borrower was, as a condition of its validity, it is plain that this bill of sale does not, so far as its mere words, taken by themselves, are concerned, attain to any such certainty; because on the face of it the result of its provisions is that, when the lump sums of 2*l.*, which are to be paid as instalments under it, are respectively paid, a varying proportion

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of them respectively will be applicable to the payment of interest and to the payment of capital. The sum payable in respect of interest will obviously be diminishing, as the amount of the principal which has been paid off by the previous instalments increases. It seems to have been recognized in several cases that a serious uncertainty is thus occasioned, whereas the Legislature may reasonably be supposed to have intended that borrowers should know with certainty what their obligations were under bills of sale. But any objection based upon this uncertainty appears to have been got over in previous cases upon an examination of the form prescribed by the Act. It is pointed out in those cases that this very uncertainty, which has been relied on as a ground for avoiding a bill of sale, exists in the statutory form itself. That is the ground of the decisions in those cases. I do not know that I need go through all those decisions, but I will mention two or three of them specifically. I wish to say that, although there may have been some decisions and dicta on the subject which are not very easily reconcilable with others, if one finds a series of decisions, including decisions in the Court of Appeal and also in the High Court, which recognize that certain provisions in a bill of sale are not grounds for avoiding it, then, even if those decisions are based on a view different from that which one might at first have been disposed to take, one is, in my opinion, bound to follow what I may call the established construction of the words of these bills of sale; and that becomes still more plainly incumbent on one, when one bears in mind that, as bills of sale are being executed from day to day, one ought not to throw any doubt on decisions which have probably been the basis of a number of such transactions. The principle applies which has been often acted on with regard to points of conveyancing and real property law, namely that, where decisions have long stood as part of the law of the land, the Court ought to abstain, not only from departing from those decisions, but also from throwing any doubt upon their correctness. With regard to the objection based upon difficulty of calculation, and of ascertaining how much of the instalment, in this case 2*l.* per month, is applicable to interest, and how much to principal, I think we are bound by decisions, which

have been already given in this Court, and in which it has distinctly been held with regard to words such as those contained in this bill of sale that it is no objection to the validity of the bill of sale that there is nothing on the face of it to shew how much of the instalment is applicable to principal and how much to interest. It might, perhaps, have been arguable in the first instance that, upon the true construction of words such as those we have to construe, the whole amount of the instalments mentioned must be attributed to principal, or that equal proportions must go to principal and interest: but, upon the decisions, we are, I think, entitled to say that the proper construction of words like these in a bill of sale may be that you should in the first instance apply the instalment to the payment of the interest and that the residue should then be applied to principal. Buckley L.J. has pointed out in the course of the argument that there is really no difficulty, having regard to the decisions on the subject, in saying in this case that, when the first instalment of 2*l.* is paid, the true construction of the bill of sale is that 25*s.* is paid for interest and the residue of 15*s.* for principal. As I have intimated, I quite see the force of the arguments of those who oppose that view, and that it may be urged that there is nothing in the words themselves which authorizes or insists on any such proportions of the instalment being applied to principal and interest. In some of the very decisions on the subject to which I have alluded, the Court has in terms recognized the force of the arguments which tell against this mode of applying the instalments.

I do not wish to take up too much time by citing many cases. I will begin with the case of *Goldstrom* v. *Tallerman*. (1) I do not think I need go in detail into the judgment. I will first refer to part of the head-note which appears to me to state the effect of the judgment accurately, and which is as follows: "Held that upon the true construction of the bill of sale interest upon interest was not reserved, but that the word 'instalment' referred only to the monthly payments of principal." An argument was put forward in that case, which was not urged, as I understood him, by the counsel for the plaintiff here,

(1) 18 Q. B. D. 1.

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but was referred to by him as the basis of the decision of Scrutton J., namely that, according to the true construction of words very like the words in the present case, there was a reservation of interest upon interest. Returning to the head-note in *Goldstrom* v. *Tallerman* (1), it proceeds thus: "Held, also, that the form of bill of sale in the schedule to the Bills of Sale Act, 1882, does not require that the payments of interest should be always of equal amount, and that therefore the bill of sale was not void on the ground that the payments of interest would vary in amount from time to time." The next decision to which I will refer is *Simmons* v. *Woodward* (2), in the House of Lords. In that case I need not refer to the head-note and the facts, which are of considerable length, but the passage to which I wish to refer is in the judgment of Lord Halsbury. (3) He there said: "My Lords, the third point it is very difficult indeed to deal with, because it first requires to be understood, and I am not quite certain that I have yet gathered its complete meaning. It appears to be this, that whereas an example is given of the form in the schedule, in which you are to state when the instalments are to be due, and the Legislature has there suggested a form in which the instalments are to be equal, therefore, unless the sum lent, together with interest (because it appears to me that the interest is an essential part of the instalments, according to the provisions both of the Act itself and of the form suggested in the Act, to give effect to the bill of sale), is capable of accurate sub-division, you cannot do it—that you cannot possibly make a bill of sale which shall have an unequal division of the sum lent. My Lords, I do not say that the learned counsel acquiesced in that view—on the contrary, I think they both repudiated it; but it seems to me that the argument, pushed to its logical extreme, comes to that. I am aware that one of the learned counsel said that all he would require was that the phrase '20*l.*' should have occurred as descriptive of the last instalment, instead of '30*l.*' in the present instance; but I am not disposed to accept his view of the provisions of the Bills of Sale Act. I think a bill of sale must comprehend, not only the principal sum, but the

(1) 18 Q. B. D. 1. (2) [1892] A. C. 100.
(3) [1892] A. C. at p. 107.

interest; and according to the contention, a somewhat elaborate calculation must be gone through, and the parties must insert the result of that calculation in the bill of sale in order to make the bill of sale good. My Lords, it seems to me that it is perfectly hopeless to substantiate any such contention. If the bill of sale in substance performs the function which the statute intended to be performed by that form, it appears to me that it is complied with; and to apply such—I was going to say nimia subtilitas—to a bill of sale, as is contended for, when a money-lender is seeking to enforce his rights, seems to me to introduce a new canon of construction which I for one will not be a party to." That is the view of Lord Halsbury, and his words dispose to a large extent of the argument for the plaintiff that the bill of sale does not state in terms the proportions in which the sums payable as instalments are applicable to principal and interest. Lord Halsbury says that it is unnecessary that it should do that, although, in order to arrive at those proportions, the borrower may have to go through a somewhat elaborate calculation.

Next I will call attention to one more judgment, namely, that of Lindley L.J. in *Linfoot* v. *Pockett*. (1) After stating first that the uncertainty occasioned by a bill of sale in this form is unquestionably a serious matter to borrowers, because such a document might in the hands of unscrupulous persons be used for purposes of oppression, he says: "The transaction is one for lending money—it is a loan transaction, and although the principal sum and interest is to be repaid by instalments of 6*l*. each, if when you come to the last instalment there is not so much as 6*l*. due, the borrower must pay what is due. I think that is the obvious construction to be put upon it. But it has been urged that that does not get over the difficulty, because you cannot find out when the loan is at an end—when the principal has been paid off; and at first I thought that was a serious matter." I read this passage as shewing that the learned Lord Justice recognized the uncertainty which was caused by this form of bill of sale. Then he goes on: "But when we look closely at the form in the schedule to the Act of 1882, I do not think we can go as far as to say this bill of sale is

(1) [1895] 2 Ch. 835, at pp. 846, 847.

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void as not being in accordance with it. The form given in the schedule runs thus." He then read the form and went on: "There is no time specified there when the payments are to cease; but, if you construe this document as Fry L.J. did in the case of *Goldstrom* v. *Tallerman* (1) and read it as a contract to pay the principal and interest by equal instalments, each composed of the interest then due, and a part of the principal,"—I think there is some slip there, for Fry L.J. does not appear to have construed the bill of sale in that case as a contract to pay interest and principal by instalments, each composed partly of principal and partly of interest—" you can ascertain by a not very difficult calculation how much principal you have paid off, and how much you ought still to pay. But still a calculation has in any event to be made, and I cannot say that a bill of sale is void because that calculation is made a little more troublesome. I think that is a sound principle to go on, and I observe that Lord Halsbury in *Simmons* v. *Woodward* (2) says it appears to him that interest is an essential part of the instalments." Having regard to those decisions, I come to the conclusion that the objection based on the uncertainty which I have mentioned as resulting from the terms of the bill of sale cannot be allowed to prevail. As I have already said, it has been stated in many decisions that this very uncertainty arises upon the terms of the statutory form itself.

Then there is the default clause. We have to read that clause together with the words of the bill of sale which are taken from the statutory form, and to consider whether the two taken together raise any difficulties which would not arise upon so much of the clause as is taken from the form in the schedule if read alone. It is said that the words of the default clause must be construed in a way which shews that there is something in the bill of sale which is inconsistent with the form in the schedule. With regard to that it is to be observed that in the case of *Pettit* v. *Lodge & Harper* (3), to which our attention was called, the Master of the Rolls in his judgment (4) puts a construction upon words very similar to those which we have in this case to construe. He said: "It is perfectly clear that under

(1) 18 Q. B. D. 1.
(2) [1892] A. C. 100, at p. 107.
(3) [1908] 1 K. B. 744.
(4) [1908] 1 K. B. 747.

the bill of sale at the end of the first week there was payable a capital instalment of 5*s.* 9*d.* plus interest on the entire principal sum, amounting in all to 12*s.* 1*d.*, and that, in default of payment of this 12*s.* 1*d.*, or any part of it, on that date, the bill of sale holder became entitled to enter. The amount of interest payable under the bill of sale of course would be greatly reduced as the capital instalments were paid off, so that, when the last instalment became due, there would be very little more payable than the 5*s.* 9*d.* But this was not the real bargain between the parties." It is said that that decision goes far towards sanctioning the construction of the bill of sale with which we are dealing contended for by the plaintiff's counsel; but, when one looks at the bill of sale in that case in the light of the earlier case of *Goldstrom* v. *Tallerman* (1), it is plain that the conclusion arrived at really depended upon arithmetical considerations which arose upon the face of the bill of sale. Under these circumstances I see nothing in that or the earlier decision which binds us to hold that the bill of sale here in question can be avoided on the ground that upon the true construction of its terms there is something in it inconsistent with the provisions of the Bills of Sale Act, 1882.

I wish to mention one other matter. It was suggested that it is very uncertain what is the true construction of this bill of sale, and that not only might the construction which was put upon the bill of sale in the last case I have mentioned be put upon it—which is a fallacy, I think—but that Scrutton J. read it as giving the lender compound interest, which would be quite inconsistent with the Bills of Sale Act, and Bray J. was in the first instance disposed to think the same. All I can say is that, in my opinion, the ambiguity which is thus suggested to exist in this bill of sale is not such an ambiguity as, having regard to previous decisions, we ought to treat as fatal to its validity. I thought at first that the defendant's counsel suggested that ambiguity could never be regarded as a ground for avoiding a bill of sale: that, if the document was capable of a legal construction at all, it mattered not that it was ambiguous in the sense that a reasonable man might read it as having

(1) 18 Q. B. D. 1.

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either of two meanings wholly different from each other, one of which might be very oppressive to the borrower and the other might be the construction put upon it by the borrower, when presented to him by the lender, and that there would nevertheless be no ground for avoiding such a bill of sale, if it was such that a Court could arrive at a construction of it. I subsequently gathered that this was not the contention of the counsel for the defendant, and that he did not mean to exclude ambiguity as a possible ground for avoiding a bill of sale. With regard to this question I think the judgment of Lord Watson in *Simmons* v. *Woodward* (1) indicates that there may be an ambiguity which would avoid a bill of sale. Speaking for myself, I do not think that, if the terms of a bill of sale were such as would raise a real ambiguity in the minds of reasonable persons acting in a matter of business, that would not be a sufficient ground for avoiding the bill of sale. Having regard to many authorities to which I will not refer now, it appears to me that the Courts have recognized that the existence of a real ambiguity would be ground for avoiding a bill of sale, but that in the case of this bill of sale there is no such ambiguity.

With regard to the case of *Edwards* v. *Marston* (2) I only wish to say this. It appears to me to be certainly a decision as to what the judgment in *Goldstrom* v. *Tallerman* (3) did not mean, whatever it may mean. The counsel for the defendant there argued as follows: "It was held by this Court in *Goldstrom* v. *Tallerman* (3) that the meaning of these words in the statutory form is that the equal instalments or payments are to be of principal." That being the argument, Lord Esher M.R. and Kay L.J. dealt with it in their judgments. Lord Esher M.R. said: "I do not believe, and I am prepared to deny, that the expressions used by Fry L.J. in giving the judgment of the Court in the case of *Goldstrom* v. *Tallerman* (3) have the meaning that has been attributed to them in argument. They were phrases applicable to the case before the Court at the time, and expressed the meaning of the form as applied to that case.

(1) [1892] A. C. 100, at p. 109. (2) [1891] 1 Q. B. 225.
(3) 18 Q. B. D. 1.

They were not a general description of the effect which the form was intended to produce in all cases." Kay L.J. said: "It was argued that we were bound to treat the payments of 2*l.* 10*s.* per month as payments on account of principal, and that the case of *Goldstrom* v. *Tallerman* (1) had laid down a hard and fast rule that the form must be construed as meaning, when it says that 'A. B. will duly pay to C. D. the principal sum aforesaid, together with the interest then due, by equal payments,' that the equal payments must be of principal only. I cannot think that that was the meaning of the judgment in *Goldstrom* v. *Tallerman*." (1) Reading those judgments I cannot agree that Fry L.J. laid down in *Goldstrom* v. *Tallerman* (1) any inflexible rule as to the construction of the form in the schedule to the Bills of Sale Act, 1882. For these reasons I think that this appeal should be dismissed.

FLETCHER MOULTON L.J. In this case I think that the plaintiff has no merits whatever. It is clear upon the affidavits, and has been admitted by counsel on both sides, that the real bargain was that the repayment of both principal and interest should be by payments of 2*l.* per month. I am satisfied that both parties intended to embody that bargain in the bill of sale, and the receipts given shew that they all along acted in accordance with that interpretation of it. But the plaintiff's counsel now argues that the plaintiff is entitled to rely upon the legal interpretation of the bill of sale, and that, if, on that interpretation, it does not carry out that which was the real bargain between the parties, it must be treated as invalid. Therefore we have to construe the bill of sale in its strict legal sense.

I confess I feel much difficulty as to what my decision in this case ought to be. There is in the schedule to the Bills of Sale Act, 1882, a standard form, and s. 9 provides that "a bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed." We have not here to consider what the words "in accordance with" mean in that context, because in this bill of sale the very words

(1) 18 Q. B. D. 1.

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of the form are used. By the form the borrower agrees that he will "duly pay to" the lender "the principal sum aforesaid, together with the interest then due, by equal —— payments of £—— on the —— day of ——." Two interpretations of this language of the form have been put forward. One is that it deals with repayment of the principal, and provides that it shall be repaid by equal instalments on certain dates, and that, with the obligation so to repay it, there is to be coupled the obligation to pay the interest due at the time of payment of each instalment: the other is that the instalments successively payable shall be equal in amount, though they are to include payment of the interest then due as well as that of the principal. We know, of course, that in many cases, such, for instance, as that of loans for the purpose of improvements, it is a common practice to make a contract for repayment on an actuarial basis, which provides for payment of equal instalments at certain dates which shall, when taken together, be equivalent to the payment of the principal with a certain rate of interest for the time that it is outstanding. Of course it is possible that the words of the form might refer to this well-known practice; but, speaking for myself, I cannot think that the draftsman of the Act intended to adopt, in the scheduled form of a bill of sale, one which involves such a special calculation. In the case of such an instrument I think it more likely that the words were intended to prescribe the time and mode of repaying the principal with the addition of the obligation that the borrower should, at the time of so paying the principal, also pay the interest from time to time then due. If the matter were res integra, I should be inclined to think that this, which is certainly a possible interpretation of the words, was the one intended.

But in this matter one is not left to form one's own opinion as to the meaning of the words. There is, in my opinion, a decision of this Court binding upon us to the effect that the construction to which I incline is the correct interpretation of the scheduled form. In the case of *Goldstrom* v. *Tallerman* (1), in which the Court of Appeal (consisting of Lord Esher M.R., Bowen L.J., and Fry L.J.) reserved judgment, and the judgment

(1) 18 Q. B. D. 1.

of the Court was given by Fry L.J., we have a judicial construction of the words of the scheduled form. This construction is so definite and so important in connection with the present case that I propose to read at length the portion of the judgment which relates to it. In that case there was no doubt that the instalments provided for were payments in respect of principal only, because the provision was for payment of twelve instalments of 41*l.* 13*s.* 4*d.*, which exactly make up 500*l.*, the amount of the principal; so that, on arithmetical grounds, only one interpretation of that particular bill of sale was possible; but the importance of the case for the present purpose is that the judgment contains what appears to me to be a deliberate pronouncement upon the meaning of the scheduled form. Fry L.J. says: "In the next place, this argument has been adduced. It is said that the deed in question provides for the payment in each month of an equal sum for principal, but of diminishing, and, therefore, unequal, sums for interest; that the form of a bill of sale in the Act of 1882 provides for the payment of principal and interest by equal sums representing both principal and interest; and, consequently, that the bill of sale in question is not in accordance with the statutory form." The argument, therefore, not only raised this question as to the meaning of the scheduled form, but raised it in a way which made a decision upon it essential to the judgment given. It was alleged that, because in that case the equal payments were equal payments of principal, the instrument was at variance with the statutory form which meant equal payments including both principal and interest. The Lord Justice proceeded: "Such is the argument. But does the statutory form provide for such a payment as is thus suggested? The words in the form are these":—The Lord Justice then read the words in the form, and went on: "It is argued that, according to this form, the whole principal and interest must be ascertained once for all, and the periodical sum fixed which will satisfy both principal and interest by equal sums, the relative proportion of principal and interest varying in each payment, the principal increasing as the interest diminishes. Such a mode of payment is well known in the case of building societies. But, in our opinion, the statutory form does not require such a mode of payment.

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It is suggested that the form requires the computation of the whole interest on the principal at once, the addition of this sum to the principal, and the division of such total sum into the stipulated number of instalments. But, in our opinion, the word 'then,' in the phrase 'interest then due,' excludes any such construction, for the interest is certainly not due when it is supposed that the addition should take place; on the contrary, we think that the words 'together with the interest then due' are parenthetic, and that the word 'then' is used in anticipation of the dates for payment thereafter given: so that, in fact, these words may be properly transposed and placed after the stipulation for payment of principal, and the whole sentence would then run thus: 'He will duly pay the principal sum aforesaid by equal —— payments on the —— day of ——, together with the interest due at the respective times of payment of the instalments of the principal.' Taking this view of the statutory form, we think that the argument under consideration fails." This was the unanimous judgment of the Court of Appeal, by which, as it appears to me, we are bound. It is the clear rule of this Court that it is bound by the previous decisions of the Court itself, and in that case, as a necessary part of the decision, it had to consider and interpret the statutory form; and it interpreted it by saying that the words "together with the interest then due" were parenthetical, and that the equal instalments were instalments of principal.

It is possible that a decision may be overruled either by being departed from so frequently as to lose its authority, or by being overruled by a superior Court. Two cases have been referred to as shewing that the decision in *Goldstrom* v. *Tallerman* (1) is no longer law. I will take them in order of date. The first is *Simmons* v. *Woodward* (2), which is a rather peculiar case. In that case a point was raised in the House of Lords which does not appear to have been raised in the Court of Appeal, and which was widely different from that with which we have to deal in the present case. There the sum lent was 500*l.* and the grantor of the bill of sale covenanted to pay the principal sum of 500*l.*, together with the interest then due, by monthly payments of 30*l.*

(1) 18 Q. B. D. 1. (2) [1892] A. C. 100.

on the 18th of every month, the first payment to be made on the 18th day of July then next. The point raised was that the sum of 500*l.* does not divide equally into multiples of 30*l.*, and therefore the last instalment would be less than 30*l.* The objection was an absurd one, for, if only a sum less than 30*l.* remained due, that only would be payable as the last instalment. No question was raised, so far as I see, as to the meaning of the form in the schedule. It was only a question of a misdescription of the instalments to be paid. The bill of sale was no doubt, as regards its language, in accordance with the form to be found in the schedule to the Bills of Sale Act, 1882. Lord Halsbury in dealing with the point raised says: "It appears to be this, that whereas an example is given of the form in the schedule, in which you are to state when the instalments are to be due, and the Legislature has there suggested a form in which the instalments are to be equal, therefore, unless the sum lent, together with interest (because it appears to me that the interest is an essential part of the instalments, according to the provisions both of the Act itself and of the form suggested in the Act, to give effect to the bill of sale), is capable of accurate sub-division, you cannot do it—that you cannot possibly make a bill of sale which shall have an unequal division of the sum lent. My Lords, I do not say that the learned counsel acquiesced in that view—on the contrary, I think they both repudiated it; but it seems to me that the argument, pushed to its logical extreme, comes to that. I am aware that one of the learned counsel said that all he would require was that the phrase '20*l.*' should have occurred as descriptive of the last instalment, instead of '30*l.*' in the present instance; but I am not disposed to accept his view of the provisions of the Bills of Sale Act. I think a bill of sale must comprehend, not only the principal sum, but the interest; and, according to the contention, a somewhat elaborate calculation must be gone through, and the parties must insert the result of that calculation in the bill of sale in order to make the bill of sale good. My Lords, it seems to me that it is perfectly hopeless to substantiate any such contention." Therefore he seems to consider that it is hopeless to substantiate the contention that

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you must calculate the interest, and add it to the principal, and then divide it up into instalments. Then he goes on: "If the bill of sale in substance performs the function which the statute intended to be performed by that form, it appears to me that it is complied with; and to apply such—I was going to say nimia subtilitas—to a bill of sale, as is contended for, when a money-lender is seeking to enforce his rights, seems to me to introduce a new canon of construction which I for one will not be a party to." Therefore he finds that the contention of the respondents fails. I do not think that the point with which we are dealing arose in that case, and I cannot look on the judgment of Lord Halsbury as in any way amounting to a pronouncement as to the meaning of the words of the form with respect to that point. Lord Watson dealt with the point raised in that case very curtly and in a very characteristic way. He said: "As for the third and last point raised, I have only to say that there is nothing objectionable in the language of the bill of sale which does not arise from the parties having followed word for word the language which the schedule prescribes." The point raised in that case was a frivolous one; and I do not think that anything which was there said relieves me from the duty of following the unanimous decision of this Court in *Goldstrom* v. *Tallerman*. (1)

The other case cited was the case of *Linfoot* v. *Pockett* (2), in which Lindley L.J. delivered the leading judgment. In this case, also, the point with which we have to deal did not in truth arise. The words of the bill of sale were as follows: "And the said mortgagor doth further agree and declare that he will duly pay to the said mortgagee the principal sum aforesaid together with the interest then due as follows: the sum of 6*l.* on December 5, 1894, on account of interest and principal, and a like sum of 6*l.* on account as aforesaid on the 5th day of each and every succeeding month thereafter." There was, therefore, no doubt that the equal amounts in that case were to be paid on account of both interest and principal. The question was raised whether that bill of sale was void as not being in accordance with the form in the schedule. I wish to say

(1) 18 Q. B. D. 1. (2) [1895] 2 Ch. 835.

that, in my opinion, the scheduled form was not inserted in the Act with the intention that all bills of sale should provide for the payment of the principal and interest in a stereotyped manner. I can see no reason why a bill of sale should not provide for payment by instalments of unequal amounts. To insist that payment should only be made in one particular way is so unnecessary and useless a restriction upon liberty of contract that I cannot believe that the Act imposes it. The mode of payment prescribed in the scheduled form is only put in as an example, and is intended to be altered according to the circumstances of the case. Hence I do not see that there was any objection to the bill of sale in *Linfoot* v. *Pockett* (1) on that ground. Lindley L.J. there said: "Then comes a totally different point. It has been argued before us, and I was at first struck by the argument, that this bill of sale was void as not being in accordance with the form in the schedule to the Act of 1882. The objection urged is that by mixing up as this bill of sale does the principal and the interest together, and making the whole debt consisting of principal and interest payable by equal instalments of 6*l.* monthly, the borrower cannot without a troublesome calculation, which most borrowers are incapable of making, find out when he has paid off his security. Unquestionably this is a serious matter to borrowers, because such a document as this in the hands of unscrupulous men like the defendant might be used for the purpose of gross oppression. I feel that very strongly; but it does not follow of course that on that ground we can hold this bill of sale to be void. The first thing we have to do is to construe it; and we must construe a bill of sale as we would construe any other instrument, that is, with the view of understanding it in reference to the transaction to which it relates. The transaction is one for lending money—it is a loan transaction, and, although the principal sum and interest is to be repaid by instalments of 6*l.* each, if when you come to the last instalment there is not so much as 6*l.* due, the borrower must pay what is due. I think that is the obvious construction to be put upon it. But it has been urged that that does not get over the difficulty, because you cannot find

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out when the loan is at an end—when the principal has been paid off; and at first I thought that was a serious matter. But, when we look closely at the form in the schedule to the Act of 1882, I do not think we can go as far as to say this bill of sale is void as not being in accordance with it. The form given in the schedule runs thus." The Lord Justice then read it and proceeded: "There is no time specified there when the payments are to cease; but if you construe this document as Fry L.J. did in the case of *Goldstrom* v. *Tallerman* (1) and read it as a contract to pay the principal and interest by equal instalments, each composed of the interest then due and a part of the principal, you can ascertain by a not very difficult calculation how much principal you have paid off and how much you ought still to pay." That passage puzzles me very much, because in *Goldstrom* v. *Tallerman* (1) Fry L.J. interpreted the form in a totally different way, namely, as a contract to pay off the principal by equal instalments and the interest in addition thereto, whereas Lindley L.J. seems to have supposed him to have construed it as meaning that each of the instalments included principal and interest. I cannot help thinking that the Lord Justice, careful as he was, must have made some mistake as to the effect of what Fry L.J. said in *Goldstrom* v. *Tallerman*. (1) The Lord Justice proceeded: "But still a calculation has in any event to be made, and I cannot say that a bill of sale is void because that calculation is made a little more troublesome. I think that is a sound principle to go on, and I observe that Lord Halsbury in *Simmons* v. *Woodward* (2) says it appears to him that interest is an essential part of the instalments. It would seem from this that the then Lord Chancellor did not quite adopt the construction put upon the form by Fry L.J." That I agree is possible, but I do not think that the judgment of Lord Halsbury, or any other judgment in the House of Lords, amounts to a decision as to the meaning of the words of the form which we have to construe. The learned Lord Justice then goes on to say: "But whether that is so or not, in the face of that and of the other decisions which have been referred to, I do not think we could say that, because

(1) 18 Q. B. D. 1. (2) [1892] A. C. 100, at p. 107.

a bill of sale requires a little more calculation than the form in the schedule, it must necessarily be void under the clause in the Act which says that bills of sale shall be void if they are not in accordance with that form. It is impossible to say that the form precludes a loan upon the terms that the principal and interest shall be paid together by equal instalments, though the construction is not so clear as at first sight appears. What we are asked to say is that a bargain such as this, which is common in building societies, makes a bill of sale necessarily void. We are not prepared to go that length." Nor am I. I do not think that the fact of the form being given in the schedule to the Bills of Sale Act prevents such a variation from it as to allow payment to be made by equal sums representing both interest and capital. When the language of the learned Lord Justice is looked at, he is far from deciding that the form in the schedule, as it stands, bears a different interpretation from that which Fry L.J. put upon it in *Goldstrom* v. *Tallerman*. (1) What he says is that he does not think that the Court could say that, because a bill of sale requires a little more calculation than the form in the schedule (with which the bill of sale in *Goldstrom* v. *Tallerman* (1) agreed), it must necessarily be void. I can see nothing in that language of Lindley L.J. which is inconsistent with the decision of this Court in *Goldstrom* v. *Tallerman* (1) as to the construction of the form in the schedule. I look upon myself, therefore, as bound by a clear decision of this Court as to the meaning of the scheduled form which has, in my opinion, never been overruled.

We have on this point been referred to the language used by Lord Esher M.R. in *Edwards* v. *Marston* (2) concerning the decision in *Goldstrom* v. *Tallerman*. (1) He there said: "I do not believe, and I am prepared to deny, that the expressions used by Fry L.J. in giving the judgment of the Court in the case of *Goldstrom* v. *Tallerman* (1) have the meaning that has been attributed to them in argument. They were phrases applicable to the case before the Court at the time, and expressed the meaning of the form as applied to that case. They were not a general description of the effect which the form was intended to produce in all cases." That statement is quite unsustainable.

(1) 18 Q. B. D. 1. (2) [1891] 1 Q. B. 225.

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The judgment in *Goldstrom* v. *Tallerman* (1) was a written judgment, so that we have an unimpeachable record of it, and one has only to refer to the judgment itself to see that the phrases in the judgment referred to did not relate only to the form as used in that case. They related to the statutory form as it stands in the Act. With all respect to the learned judges who decided *Edwards* v. *Marston* (2), I cannot put any other meaning, and I am satisfied no other meaning can be put, upon the language of Fry L.J. in *Goldstrom* v. *Tallerman* (1) than that which I have stated. In saying this, I do not impugn in any way the correctness of the decision in *Edwards* v. *Marston*. (2) The words used in *Edwards* v. *Marston* (2) were different, and undoubtedly the interpretation put upon them by the Court of Appeal was correct. The words were as follows: "And the mortgagor doth further agree and declare that he will duly pay to the mortgagee the principal sum aforesaid with the interest then due as follows: the sum of 2*l.* 10*s.* on October 26, 1887, and the like sum of 2*l.* 10*s.* on the 26th of each and every succeeding month thereafter until September 26, 1889: then the balance and interest as aforesaid is to be paid." The Court held that in that contract the sum mentioned referred only to the interest, because it was precisely the interest on the principal sum, which was 50*l.*, and that the balance which was to be paid at the end of the monthly periods was the principal. The point which they had to decide had nothing to do with the construction of the words of the statutory form, and their views of the meaning of that form were not essential to their judgment, but were at most merely obiter dicta by way of criticism on a previous judgment, for which there was no warrant. For these reasons I am of opinion that there is a binding decision of this Court that the language of the form scheduled to the Act bears the meaning that the principal is to be paid by equal instalments of the principal only, with the addition that the interest from time to time due is to be paid therewith. But it must be fully understood that in my opinion that does not prevent other arrangements as to payment being lawfully made.

So far I have only dealt with the scheduled form itself. The

(1) 18 Q. B. D. 1. (2) [1891] 1 Q. B. 225.

form of the present bill of sale contains all that is in the scheduled form, but adds the words "and that, in default of payment of any instalment of the said principal sum, he will pay interest on such instalment at the rate aforesaid from the date when the same shall become due until payment thereof." In *Goldstrom* v. *Tallerman* (1) Fry L.J. points out the importance of adding a provision of this kind, because, if the undertaking is to repay the principal sum at a certain date, paying in the meantime a high rate of interest, it follows that, if it is not paid at that date, a jury would have to fix the rate of interest after the date of default, and they might only give 5 per cent., and therefore there is a good reason why there should be such a provision as to the interest. In my opinion the presence of this default clause tends to support, rather than militate against, the interpretation which this Court put upon the form scheduled to the Act in *Goldstrom* v. *Tallerman* (1), because I cannot think that the words "in default of payment of any instalment of the said principal sum" refer to an amount obtained by way of residue from the instalment by assuming that the whole of the interest then due is first paid out of it. I do not see in the terms of this bill of sale anything which, in case of the payment of an amount not strictly in accordance with the amount provided for, would give a legal right, first, to deduct from it the whole of the interest due, and then to treat the residue only as paid on account of principal. In the present case this was no doubt done, but this was because there was no appropriation of the payments by the payer and a clear appropriation of them in this way by the receiver, with the knowledge of the payer, as is shewn by the receipts. I think that the consequences which are by the default clause to follow from non-payment of an instalment of the principal militate against construing the document in the sense that the lump sums were intended to be treated as a mixture of principal and interest.

Holding, therefore, that the decision in *Goldstrom* v. *Tallerman* (1) did not depend upon any special facts in the case, but was a deliberate judicial decision as to the effect of the statutory form, it follows that I hold that on the true construction of the

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bill of sale it does not correspond with the bargain admittedly made between the parties, and therefore the appeal should be allowed.

BUCKLEY L.J. The question for decision is whether the bill of sale in this case is void. The plaintiff contends that it is, first, because it does not express the real bargain between the parties, and, secondly, because it is unintelligible. I think it does express the real bargain, and that it is quite intelligible. There is no question as to what the real bargain between the parties was; they are at one upon that point. They agree that it was that the borrower should pay 2*l.* per month, which sum was to include the interest. I propose in the first place to look at the instrument in order to see whether it does or does not give effect to that bargain.

In order to construe a document, the true way to proceed is to read it, and in the first instance to form my own opinion as to the meaning of the language used, regardless of the consequences. I therefore shall look at the document and form my own opinion as to the meaning of the words, though I may afterwards be able in this particular kind of security to fortify myself by consideration of authorities. This document shews upon its face that a loan was made of 30*l.*, and the effect of the first clause of the witnessing part of the instrument is that a security for that loan with interest at 10*d.* in the 1*l.* per month is given upon certain property. The instrument then goes on to define the personal liability of the borrower as follows. He agrees and declares that "he will duly pay" to the lender "the principal sum aforesaid," i.e. 30*l.*, "together with the interest then due,"—i.e. due at the date of each payment—"by monthly payments of 2*l.* on the 9th day of every month succeeding the date of these presents, the first payment to be made on the 9th day of November next." There is more coming in the instrument, but I will consider the meaning of these words first. The "principal sum aforesaid" is 30*l.* The "interest then due," that is to say at any particular monthly date, is, of course, another sum to be ascertained by calculation. So that 30*l.* together with some other sum,

namely, the interest then due, is to be paid by monthly payments of 2*l.* on the 9th day of every month. To my mind the prima facie and obvious meaning of those words, and that which I ought to adopt unless I am driven to adopt some other, is that, in respect of those two sums, the principal and the interest then due, there is to be made a payment of 2*l.* on each of the monthly dates. Then the question arises, the 2*l.* being paid, in what proportion is this sum of 2*l.* to be attributed to the principal and to the interest then due respectively? The meaning appears to me to be this. Take by way of illustration, as it is easier to explain the matter by figures, the sum of 2*l.* payable at the end of the first month: the principal would then be 30*l.*, as nothing would then have been repaid: the interest then due would be 25*s.* The grantor has by the terms of the bill of sale agreed that he will pay 30*l.*, together with the interest then due, i.e. at the dates of the respective payments, by monthly payments of 2*l.* With the sum of 2*l.* you cannot, of course, pay 30*l.*; you may, however, pay something towards it; but the grantor is to pay the interest then due, which is 25*s.*, and there is enough to meet that interest. So I think that, first, 25*s.* out of the 2*l.* must be applied in payment of the interest. Then regard must be had to the words "the principal sum aforesaid." 30*l.* cannot be paid with 15*s.*, but part of it can; and I think that the proper appropriation under the instrument is that 25*s.* out of the sum of 2*l.* must be attributed to interest, and the balance towards the discharge of the principal. Then, reading on, comes the default clause which has been relied on by the plaintiff as shewing that the bill of sale varies the bargain as made between the parties. The words of that clause are "that in default of payment of any instalment of the said principal sum, he will pay interest on such instalment at the rate aforesaid from the date when the same shall become due until payment thereof." It is to be observed that in the opening words of that clause, "in default of payment of any instalment of the said principal sum," there is implied a suggestion that there might have been default in payment of something other than the instalment of principal, namely, default in payment of "the interest then

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due"; and these words appear to have been used for the purpose of providing that, in that case, the further interest mentioned is not to be paid in respect of the whole of the payment in reference to which there has been a default, but only of so much of it as represents principal and not interest. This clause, therefore, appears to me clearly to affirm the proposition that the instalment of 2*l.* is not all to be paid in respect either of principal or of interest, but is to be paid partly in respect of the one and partly in respect of the other, and to provide that, as to so much only as is due in respect of principal and not paid, the liability mentioned in the clause is to be imposed upon the borrower. The above is the construction which, apart from authority, I should put upon this bill of sale.

But I am told that there are authorities on this subject which ought to weigh with me. I agree that this is so, because this particular instrument is given under an Act of Parliament which prescribes a special form for bills of sale, which they must follow in order to be valid. The language of the bill of sale which we have in this case to construe follows the form exactly with the exception of the default clause, as to which I shall say nothing further, because it simply supports me in the view which I have so far expressed. The relevant words of the bill of sale are exactly the same as the words in the form. With regard to the meaning of those words in the form, being, as they are, the same as those of this bill of sale, Lord Halsbury in the House of Lords in *Simmons* v. *Woodward* (1) and Lindley L.J. in *Linfoot* v. *Pockett* (2) have expressed an opinion. I understand their opinion to be that, in the instalment which is expressed to be from time to time payable in the statutory form, the interest is to be considered as being added to the principal. Lord Halsbury says: "It appears to me that the interest is an essential part of the instalments according to the provisions both of the Act itself and of the form suggested in the Act, to give effect to the bill of sale." Lindley L.J., after reading the words of the form, expresses a similar opinion as to their effect. We have therefore in these cases an expression of opinion of the highest authority as to the meaning of these

(1) [1892] A. C. 100, at p. 107. (2) [1895] 2 Ch. 835, at p. 847.

words in the statutory form, in accordance with which the bill of sale has to be framed in order to be a valid security; and the bill of sale in this case uses the very words which in the judgments to which I have referred are held to express that meaning.

Three other cases were cited to us to which I wish to refer. In my view no one of them militates against what I have been saying. The first of these cases was *Goldstrom* v. *Tallerman*. (1) The point there was as follows. The amount of the advance was 500*l*., and the obligation of the borrower was to repay by twelve monthly instalments of 41*l*. 13*s*. 4*d*. As a matter of arithmetic, twelve times 41*l*. 13*s*. 4*d*. is 500*l*., the amount of the principal. The terms of the bill of sale as to repayment were: "And the mortgagor doth further agree and declare that he will duly pay to the mortgagee the principal sum aforesaid with the interest then due by twelve equal monthly payments of 41*l*. 13*s*. 4*d*. on the 21st day of August now next, and 41*l*. 13*s*. 4*d*. on the 21st day of each and every succeeding month, until the whole of the said sum and interest shall be fully paid, and in default of payment of any instalment then that he, the mortgagor, will pay interest thereon at the rate aforesaid, from the date when such instalment shall become due until full payment thereof." What the Court of Appeal held upon that state of the facts was that the instalment of 41*l*. 13*s*. 4*d*. was not to be paid for principal and interest, but for principal only, leaving the whole interest undischarged. They arrived at that conclusion, of course, by reason of the arithmetical fact that twelve monthly payments were to conclude repayment of the principal: that twelve instalments of 41*l*. 13*s*. 4*d*. equalled the amount of the principal, namely 500*l*.: and that principal without interest, therefore, exhausted the money. That case is, therefore, no authority upon the general question of the meaning of the words with which I have to do. Upon the particular facts of that case the Court of Appeal arrived at the conclusion that the words had the meaning which they gave to them, because of that arithmetical calculation. It does not follow from that decision that their prima facie meaning is not something different.

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You may be driven to give another meaning to the words on the facts of a particular case, but that does not alter their general meaning. In giving judgment Fry L.J. used language in reference to which I desire to refer to the context, because I differ, with the greatest respect, from the view which Fletcher Moulton L.J. has taken of its meaning. The argument in that case was stated by Fry L.J. thus: "It is said that the deed in question provides for the payment in each month of an equal sum for principal, but of diminishing, and, therefore, unequal, sums for interest." That is to say, in each month there was to be a payment of 41*l.* 13*s.* 4*d.*, and, inasmuch as the principal sum was therefore diminishing month by month, each month a less sum would be payable in respect of interest; and it was argued that this was inconsistent with the Act of Parliament. It was with reference to this that Fry L.J. said: "It is argued that, according to this form, the whole principal and interest must be ascertained once for all, and the periodical sum fixed which will satisfy both principal and interest by equal sums, the relative proportion of principal and interest varying in each payment, the principal increasing as the interest diminishes": and he then went on to point out that this argument is not sustainable because of the word "then"; that the phrase used is not "interest then or thereafter to become due," but "interest then due." He does that with reference to the argument with which he is dealing, namely, that you must by reason of the words of the form capitalize the whole interest to become due, and divide it, when capitalized, by a certain sum in order to arrive at the quotient which is to be the amount of the periodical sum. It is in that connection that he says that you may transpose the words "together with interest then due," so as to take them out of the words providing for payment by equal instalments. The decision is simply that the terms of the form do not necessarily mean that the instalments payable must include interest. It is not a decision that it is impossible that a bill of sale given in the statutory form should provide for instalments which include both principal and interest. The decision is only that it is no objection to a bill of sale that the instalments provided for represent principal only. If the arithmetical facts

drive the Court in the particular case to give it that construction, it does not invalidate the security under the Bills of Sale Act.

The next case is *Edwards* v. *Marston*. (1) That again turned on arithmetical considerations. There the sum advanced was 50*l*.; the interest payable was at the rate of 5 per cent. per month, which came to 2*l*. 10*s*. per month; and the obligation of the borrower was to pay the sum of 2*l*. 10*s*. per month. The Court came to the conclusion that in these circumstances the monthly payment of 2*l*. 10*s*. was in respect of interest only, and was none of it in respect of principal. In the previous case it had come to the conclusion that the whole of the monthly payment was principal, and none of it interest. The conclusion was arrived at in both cases upon the figures mentioned in the bill of sale. I wish to point out that, if the view of the decision in *Goldstrom* v. *Tallerman* (2) taken by Fletcher Moulton L.J. be correct, the decision of the Court in *Edwards* v. *Marston* (1) was plainly wrong. If the words of the statutory form mean that interest shall not be included in the instalment, the decision in *Edwards* v. *Marston* (1) cannot be right, for the Court of Appeal decided exactly the reverse of that proposition, inasmuch as they held that a bill of sale was good under which the monthly instalment went to pay interest only; and they said that it was not intended by the decision in *Goldstrom* v. *Tallerman* (2) to lay it down that the form in the schedule must necessarily mean that the instalment is to be payable in respect of principal only. *Edwards* v. *Marston* (1) was a decision of this Court. Its principle binds us. I cannot take a view of the meaning of *Goldstrom* v. *Tallerman* (2) which proceeds upon regarding *Edwards* v. *Marston* (1) as wrong.

The third case to which I wish to refer is *Pettit* v. *Lodge & Harper*. (3) That case has less bearing than the other two upon the present case, because the point now before us did not really arise. There, also, the decision turned upon arithmetical facts. The advance was 30*l*. and the interest was at the rate of 60 per cent. per annum. It appears that the weekly interest at that rate would be 6*s*. 11*d*. The obligation of the borrower as stated

(1) [1891] 1 Q. B. 225. (2) 18 Q. B. D. 1.
(3) [1908] 1 K. B. 744.

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in the bill of sale was to pay "the principal sum aforesaid (together with the interest then due) by equal weekly instalments of 5*s.* 9*d.*" Upon the language of the bill of sale it might have been open to say that the instalment was not meant to include interest, but was to go only to principal, and that the fact that the words "together with the interest then due" were in brackets assisted that construction. Cozens-Hardy M.R. seems to have said that was so, but whether it was or not was irrelevant to that which was actually decided. I was a member of the Court. I said nothing either for or against that view, for the point upon which the decision turned was not that, but another point, namely, that the parties to the bill of sale had made another bargain. Finding that the calculation of the interest under the bill of sale was difficult, they agreed to a substituted mode of payment, and what we held was that this amounted to a defeasance, and that the bill of sale therefore did not express the terms of the real bargain between the parties. Having regard to the state of the authorities on this subject, I think that we must construe the bill of sale in this case by the light of what was said by Lord Halsbury in *Simmons* v. *Woodward* (1) and Lindley L.J. in *Linfoot* v. *Pockett* (2), and also of the case of *Edwards* v. *Marston* (3), which appears to me entirely to dispose of the notion that the decision in *Goldstrom* v. *Tallerman* (4) placed upon the form in the schedule to the Bills of Sale Act, 1882, the inflexible construction which has been suggested. Under these circumstances I am of opinion that this bill of sale expresses what the parties to it intended and have carried out, and that it is valid; and consequently that this appeal should be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *J. K. Torkington.*
Solicitors for defendant: *Carthew, Wheeler & Hancock.*

(1) [1892] A. C. 100, at p. 107.
(2) [1895] 2 Ch. 835, at p. 847.
(3) [1891] 1 Q. B. 225.
(4) 18 Q. B. D. 1.

E. L.

[IN THE COURT OF APPEAL.]

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June 9;
July 23.

WHINNEY *v.* MOSS STEAMSHIP COMPANY, LIMITED.

Company—Debenture-holders—Receiver and Manager, Powers of—Shipment of Goods by Receiver—Bill of Lading—Lien for previously unsatisfied Freight.

Ind, Coope & Co., Limited, a brewery company, used to ship beer in the defendants' vessels to the company's agents abroad for the sale of beer. Among these agents was a firm in Malta. The company being in difficulties, debenture-holders, whose debentures constituted a floating charge on the undertaking and assets of the company, took steps to enforce their security, and, a debenture-holders' action having been brought, the plaintiff A. W. was by an order of the Court appointed receiver and manager of the business and undertaking of the company, which was not wound up, but continued in existence. By a letter signed "Ind, Coope & Co., by A. W. receiver and manager," the plaintiff requested the defendants to carry a quantity of beer to Malta consigned to the company, c/o the firm in Malta; and the defendants accordingly carried the beer to Malta under a bill of lading by one of the terms of which the defendants were to have a lien on the beer shipped, not only for the freight due in respect thereof, but also in respect of any previously unsatisfied freight due from the "shippers or consignees" to them. This was the form of bill of lading which had been used in the case of goods carried for the company by the defendants. The defendants refused to deliver the beer shipped as aforesaid unless certain unsatisfied freight due to them from the company previously to the plaintiff's being appointed receiver and manager was paid. No leave had been given by the Court authorizing the plaintiff to give to the defendants any security in respect of such previously unsatisfied freight:—

Held by Vaughan Williams L.J. and Buckley L.J., Fletcher Moulton L.J. dissenting, that the defendants were not entitled to a lien on the beer shipped as aforesaid for the previously unsatisfied freight, because (1.) the bill of lading had not the effect of giving the defendants such a lien, and (2.) no leave to give them such a lien had been obtained from the Court.

Appeal from the judgment of Hamilton J. in an action tried by him without a jury.

The action was brought to recover a sum of 171*l.* 19*s.* 10*d.* paid by the plaintiff to the defendants as after mentioned.

The facts, which are fully stated in the judgment of Fletcher Moulton L.J., may, for the purpose of rendering the arguments intelligible, be summarized as follows:—

Messrs. Ind, Coope & Co., Limited, a brewery company, had a

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number of agents abroad to whom they used to consign beer for sale: among these agents was a firm of Turnbull Junr. & Somerville at Malta. The company being in the year 1908 in financial difficulties, debenture-holders, whose debentures constituted a floating charge upon the undertaking and assets of the company, took action for the purpose of enforcing their security, and, judgment having been obtained against the company in a debenture-holders' action, the plaintiff was on January 5, 1909, appointed by an order of the Court receiver and manager of the business and undertaking of the defendant company, which was not wound up, but continued in existence. On January 13, 1909, the plaintiff, as such receiver and manager, being desirous of sending out a quantity of ale to Messrs. Turnbull Junr. & Somerville at Malta, wrote to the defendant company's agents at Liverpool as follows: "Messrs. James Moss & Co., Liverpool. Please deliver ale as below, charging to yours respectfully, Ind, Coope & Co. (Limited), by Arthur F. Whinney, Receiver and Manager." Then followed the marks and description of the goods. "Ind, Coope & Co. (Limited), care of Turnbull Junr. & Somerville, Strada Reale, Valetta, Malta." In consequence of the receipt of this letter and the consignment to which it referred, the defendants replied as follows: "We beg to enclose herein shipping documents for your goods forwarded according to your instructions per *Rameses* for Malta. We place to your debit the amount of our expenses thereon as per statement at foot. Yours respectfully, James Moss & Co. Note: One bill of lading sent to consignee. Please check the enclosed bills of lading, and, if found incorrect, return immediately as otherwise we can take no responsibility." Then followed description and marks on goods. The bill of lading enclosed, which was in the form which had been in use by the defendants in respect of their shipments for Ind, Coope & Co. for several years, contained the name of "Ind, Coope & Co., Limited, c/o Messrs. Turnbull Junr. & Somerville," as consignees, and included, among other provisions, the following:—"(3.) that the shipowner, his manager, servants, and agents shall have a lien and right of sale by public auction over the goods shipped hereunder, not only for the freight and charges due thereon, whether

payable in advance or not, but also for all amounts in any wise to become payable to them under the provisions of this bill of lading, although the same may not then be ascertained, and also in respect of any previously unsatisfied freight, inland or forwarding charges, primage, porterage, fines, costs and other charges or amounts due either from shippers or consignees to the shipowner, or to the owners of any steamers of the Moss Line, or to their Liverpool agents, and also for the costs and expenses (if any) of exercising any such lien, and to deduct from the proceeds of any sale the costs of and incidental thereto, or to the exercise of any such lien as aforesaid."

After the goods had been shipped under this bill of lading, and while they were in transit, the defendants applied for payment of their account for freight, which amounted to 228*l.* 13*s.* 5*d.*, of which 56*l.* 13*s.* 7*d.* was in respect of the above-mentioned consignment, and the balance, 171*l.* 19*s.* 10*d.*, was in respect of previous consignments made by the company before the plaintiff was appointed receiver and manager, the freights upon which remained unpaid. The plaintiff refusing to pay the latter amount, the defendants by letters written to the plaintiff by their solicitors on January 25 and 29, 1909, asserted that a lien was given to them by the bill of lading in respect of the whole amount of the unpaid account, and stated that no part of the goods referred to in the bill of lading would be delivered until their claim was settled in full. On January 30, 1909, the plaintiff wrote to the defendants' solicitors as follows: "I am in receipt of your letter of yesterday's date. It is true that the consignees named in the bill of lading were nominally Ind, Coope & Co., Limited, but, inasmuch as the consignment left these premises after the date of my appointment, and was consigned to my agents, they were still goods belonging to me as receiver. I cannot, therefore, admit your contention that you are entitled to place an embargo on the goods in respect of an amount due from the company. I have just heard from my agents at Malta that your clients have instructed their agents to stop the shipment ex *Rameses*. I am perfectly prepared to pay any amount rightly due to your clients, but, as this, after all, is a technical question, I should be glad if you would allow the goods to go forward, leaving the

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question as to whether your clients are entitled to the money or not to be settled hereafter. I will undertake, as receiver, to pay the amount, if it is properly payable. If you agree, will you please ask your clients to wire removing the stop." In order to prevent the goods being detained, it was ultimately arranged that the full amount claimed should be paid under protest and without prejudice, and the action was thereupon brought as above mentioned.

Hamilton J. gave judgment for the defendants.

June 9. *Leck*, for the plaintiff. The unsatisfied freight for which the defendants claim was not due from the plaintiff, who represents the debenture-holders, they having entered into possession of the undertaking and assets of the company by virtue of their charge. Clause 3 of the bill of lading does not apply as contended by the defendants, because the shippers and consignees under that bill of lading are not identical with the shippers and consignees under the bills of lading upon which the unsatisfied freights became due. Ind, Coope & Co., Limited, were the shippers of the goods in respect of which the unsatisfied freight was due, but they were not the shippers of the goods in question. The plaintiff did not ship these goods as their agent, but as the receiver and manager appointed on behalf of the debenture-holders. In respect of the freight on these goods he was personally liable: see *Burt, Boulton & Hayward* v. *Bull* (1); *In re Glasdir Copper Mines, Ld.* (2); but the company was not liable. Consequently, the amount of the unsatisfied freight was not within the terms of clause 3 of the bill of lading as being freight due from the shippers of the goods to which it related. Similarly, the unsatisfied freight, being due from the company, was not due from consignees within the meaning of the bill of lading, because, assuming that consignees were named by the bill of lading, they were not identical with the company from whom the unsatisfied freights were due. The defendants were notified by the letter of instructions signed by the plaintiff that they were not dealing with the company, but with the plaintiff as receiver and manager. The plaintiff had no authority to give

(1) [1895] 1 Q. B. 276. (2) [1906] 1 Ch. 365.

the defendants a charge upon goods which, when the debenture-holders had interfered to enforce their security, became their goods, and so to turn the defendants from unsecured into secured creditors, and give them priority over the other unsecured creditors as well as over the debenture-holders, whose interests he represented, at any rate without the leave of the Court. The position of the debenture-holders is that of mortgagees who have taken possession. [He also cited *Plumpton* v. *Burkinshaw* (1); *Owen* v. *Cronk* (2); *Sewell* v. *Burdick* (3); *In re Sacker.* (4)]

Leslie Scott, K.C., and *C. Robertson Dunlop*, for the defendants. Ind, Coope & Co. were clearly consignees named in this bill of lading; they alone could indorse it; and, as between the plaintiff and the defendants, it must be taken that the shippers and consignees were identical with the company from whom the unsatisfied freights were due. The plaintiff assented to the goods being forwarded upon the terms of this bill of lading, to which his attention was called by the defendants' letter, and which were the same as those upon which the goods of the company had always been carried by the defendants. He, therefore, must be taken to have shipped the goods on the footing that they were shipped by and consigned to the company with which the defendants had previously been dealing, and to have had notice that the defendants were receiving them on that footing. That being so, he cannot now turn round and say that the Ind, Coope & Co. named in the bill of lading are not the same as the company. The company was still in existence. The signature of the plaintiff as "receiver and manager" is not notice to the defendants that the plaintiff was appointed by the Court, or that he had no authority to enter into the contract contained in clause 3 of the bill of lading. All that it would convey to the defendants was that the plaintiff had authority to manage the business of the company. A receiver and manager might have been appointed by the debenture-holders as the agent of the company: *Gosling* v. *Gaskell.* (5) The business of the company was no doubt, after the debenture-

(1) [1908] 2 K. B. 572.
(2) [1895] 1 Q. B. 265.
(3) (1884) 10 App. Cas. 74.
(4) (1888) 22 Q. B. D. 179, at p. 185.
(5) [1897] A. C. 575.

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holders had intervened, carried on for their benefit, but, the company continuing in existence, it was for the purposes of carrying on that business identical with the company as it existed before the debenture-holders intervened. For this purpose the question what the rights might be as between the company as mortgagors and the debenture-holders as mortgagees of the business and whether the plaintiff had authority to do what he did, is irrelevant. The defendants, having carried the goods on the terms contained in the bill of lading, and on no others, have nothing to do with that question. The plaintiff and the debenture-holders as represented by him are estopped from setting up that he had not the authority which, as manager of the company that was still in existence, he would prima facie have as incidental to its management. If it was considered to be for the benefit of the debenture-holders that the company should be kept in existence, and the receiver should carry on business in its name, it would not be just that, after he had induced the defendants to carry goods under the supposition that they were dealing with the company on the same terms as usual, he should be able to say that it was not the company with whom they were dealing.

[BUCKLEY L.J. A receiver and manager appointed by the Court in a debenture-holders' action would have no right to give such a security as this to unsecured creditors of the company without the leave of the Court.]

Assuming that to be so, and that it would be a breach of duty by him towards the debenture-holders, it is submitted that this would not affect persons in the position of the defendants who contracted with a person apparently having authority to act as manager for and as representing the company, and who have altered their position by carrying the goods on the faith of his having that authority. The defendants do not know, and are not bound to know, that the manager has not got the leave of the Court, or whether he may not have got an indemnity from the company for any liability he may assume in the matter. He cannot be heard to say in the circumstances of this case that he had no authority to make the contract which he made, and under which the defendants carried the goods. The plaintiff would, if

he had no authority, be liable as for a breach of an implied warranty of authority, the damages for which would be the same as the amount of the unsatisfied freight, and therefore he cannot recover. Upon the pleadings the point that he had not the leave of the Court is not raised, and therefore is not open to the plaintiff.

[BUCKLEY L.J. The arrangement seems to have been that the case should be dealt with as if the goods were still in the hands of the defendants, who were claiming to retain them in the exercise of their alleged lien. If so, the money claimed represents the goods. The defendants might, if they were obliged to give up the goods, claim damages from the plaintiff personally, but that would not affect the debenture-holders' title to the goods.]

They cited *Rushforth* v. *Hadfield* (1); *Sheffield Corporation* v. *Barclay* (2); *Brogden* v. *Metropolitan Ry. Co.* (3); *Wolff* v. *Horncastle*. (4)

Leck in reply.

Cur. adv. vult.

July 23. VAUGHAN WILLIAMS L.J. In this case I have read the judgments of Fletcher Moulton L.J. and Buckley L.J. I concur in the judgment of Buckley L.J., which expresses much better than I could do the views that I expressed during the argument.

FLETCHER MOULTON L.J. read the following judgment:—The facts in this case are uncontested and simple. In the year 1908 the well-known brewing company, Ind, Coope & Co., Limited, got into financial difficulties, and towards the end of that year the debenture-holders took steps to enforce their security, and on January 5, 1909, on their application, Mr. Arthur F. Whinney was appointed receiver and manager in the usual way. The debentures constituted a floating charge upon the undertaking of the company as well as upon its assets; and, as the connection of this well-known company must be almost world-wide, it was

(1) (1806) 7 East, 224.
(2) [1905] A. C. 392.
(3) (1877) 2 App. Cas. 666, at p. 691.
(4) (1798) 1 Bos. & P. 316.

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evidently thought to be a valuable part of the security, for no steps were taken to wind up the company, and indeed it is still a going concern. The policy adopted by the receiver and manager is well expressed by the earliest telegram in the case, in which, when telegraphing to the agents of the company at Malta, he says "We continue to do business as hitherto."

At this time and for many years previously the company had a number of foreign agents to whom it sent out beer for sale. Among these was a firm of Turnbull Junr. & Somerville at Malta, who were appointed to act as such agents originally by an agreement made in 1901, which had in 1908 been extended for a further term of seven years. It would seem that, on hearing of the appointment of Mr. Whinney, their agents made some inquiry of him as to its effect on their position, and received in answer the telegram to which I have referred, which accurately describes the situation.

I should judge from the telegrams that were put in evidence in the Court below that it was customary for the agents to report weekly to the company the stock in their hands. Be that as it may, Messrs. Turnbull Junr. & Somerville sent to the manager a telegram of January 9 which shewed a substantial decrease in the stock in their hands on that date as compared with the week before. Accordingly the manager determined to send out further beer to replenish the stock, employing for this purpose the shipping agents, Messrs. James Moss & Co., of Liverpool, the representatives there of the defendants, the Moss Steamship Co., Limited, who own (among other lines) a line of steamships trading between Liverpool and Malta. In this also he was following the usual practice of Ind, Coope & Co., Limited. The letter sent to James Moss & Co. on the occasion of the consignment of their goods was as follows: "Messrs. James Moss & Co., Liverpool. Please deliver ale as below, charging to yours respectfully, Ind, Coope & Co., by Arthur F. Whinney, Receiver and Manager." [Here follow the marks and description of the goods.] "Ind, Coope & Co., Limited, c/o Turnbull Junior & Somerville, Strada Reale, Valetta, Malta." In consequence of the receipt of this letter and the consignment to which it refers, Messrs. James Moss & Co. sent to Ind, Coope & Co., Limited, the

bill of lading for the goods with the following letter:—"Messrs. Ind, Coope & Co., Burton-on-Trent. Sirs,—We beg to enclose herein shipping documents for your goods forwarded according to your instructions per *Rameses* for Malta. We place to your debit the amount of our expenses thereon as per statement at foot. Yours respectfully, James Moss & Co. Note: One bill of lading sent to consignee. Please check the enclosed bills of lading and if found incorrect return immediately as otherwise we can take no responsibility." Here follow description and marks on goods.

The bill of lading in question contains the names of Messrs. Ind, Coope & Co., Limited, c/o Messrs. Turnbull Junr. & Somerville as consignees. In the usual way various conditions appear therein which shew the terms on which the goods are received for carriage. The only material one is No. 3, which reads as follows: "That the shipowner, his managers, servants and agents shall have a lien and right of sale by public auction over the goods shipped hereunder, not only for the freight and charges due thereon, whether payable in advance or not, but also for all amounts in any wise to become payable to them under the provisions of this bill of lading, although the same may not then be ascertained, and also in respect of any previously unsatisfied freight, inland or forwarding charges, primage, porterage, fines, costs and other charges or amounts due either from shippers or consignees to the shipowner, or to the owners of any steamers of the Moss Line, or to their Liverpool agents, and also for the costs and expenses (if any) of exercising any such lien, and to deduct from the proceeds of any sale the costs of and incidental thereto, or to the exercise of any such lien, as aforesaid."

After the goods had been shipped under this bill of lading, and while they were still in transit, James Moss & Co. applied to Ind, Coope & Co. for payment of their account for freight, which amounted to 228*l.* 13*s.* 5*d.*, of which 56*l.* 13*s.* 7*d.* was in respect of the above consignment, and the balance, 171*l.* 19*s.* 10*d.*, was in respect of previous consignments, the freight upon which remained unpaid. Mr. Whinney refused to pay the latter item on the ground that the shipowners were only in the position of

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unsecured creditors with regard to it. Thereupon the shipowners threatened to enforce the lien which they contended was given them by the condition above recited in respect of the whole of the unpaid account. In order to prevent the goods being detained, an arrangement was made by which the goods were delivered on the terms that the rights of the shipowners should not be prejudiced thereby. The undertaking given by Mr. Whinney to this effect is contained in a letter from him to the solicitors of the defendants in this action dated January 30, 1909, and it is sufficiently wide to ensure (as it was intended to do) that the defendants should be paid all that they could have obtained by insisting on their lien. As a matter of arrangement the amount claimed was subsequently paid, and this action is brought by Mr. Whinney to recover it back.

The clearest way of presenting the point in issue in this case is as follows. It is admitted by the parties to the action that, if there had been no appointment of a receiver and manager, the defendants would have had the right of lien they claimed, because in that case Ind, Coope & Co., Limited, would have been both shippers and consignees. But it is contended by the plaintiff that the fact that a receiver and manager of the business of the company had been appointed changes the rights of the shipowners and prevents their acquiring the lien claimed. I shall examine in turn the various grounds on which this contention is rested.

The first is one put forward at the time by the plaintiff in his letter of January 30, namely, that the goods belonged to him as receiver, and that, therefore, the lien could not attach. This, of course, affords no answer to the claim of lien. The question to whom do the goods belong is immaterial so soon as it is admitted —as it must be in this case—that they were delivered to the ship for carriage by those lawfully entitled to ship them. A right of lien is good against all the world under such circumstances.

The second ground is that a lien for the unpaid freights of previous consignments did not arise because the consignee was not the same. It was suggested that Ind, Coope & Co., Limited, after the appointment of the receiver and manager was a different

entity from that which it was before that date. To my mind this is a complete fallacy. The company then was and still is a going concern. No steps have been taken to wind it up. The debenture-holders found that it was to their interest to keep the company alive, and, so long as it lives, it is and must be one and the same entity. No one but the limited company of that name can carry on business as Ind, Coope & Co., Limited, so long as that company exists. The whole beneficial interest in its assets may have passed to the debenture-holders and others, and this may fundamentally change the position of those who seek to enforce legal rights against it, but its identity is unchanged, and, as the consignee under the bill of lading is Ind, Coope & Co., Limited, it is the same consignee to whom the previous consignments were sent, and these unpaid freights come within the lien clause exactly as they would have come if the debenture-holders had not taken steps to enforce their security.

Thus far I have considered the effect of the lien clause from the point of view of the identity of the consignee. This suffices to support the defendants' case in this action. But in my opinion the shippers were also identical. This, however, is more conveniently considered in connection with the ground upon which the plaintiff next relies, which I will now proceed to consider.

It will be seen that the letter of January 13 sent to the Liverpool agents when the goods were consigned for shipment is signed "Ind, Coope & Co., Limited, by Arthur F. Whinney, Receiver and Manager."

It is contended that the presence of the words "receiver and manager" make this not a consignment by the company, but by Mr. Whinney personally on behalf of the debenture-holders, and that therefore this is not a shipment by the company at all. It was contended that this must be so because, from and after the appointment of the receiver and manager, the assets belonged to the debenture-holders, and the company could no longer deal with them in any way; and it was continually urged upon us that this was a case of a mortgagee taking possession, and that thereafter the mortgagor had nothing whatever to do with the property, and the dealings with it must ex necessitate rei be dealings of the mortgagees and not of the mortgagor.

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To my mind the error in this reasoning is due to taking too superficial a view of the nature of the transaction. It is true that it is a case of mortgagees taking possession, but it has the peculiarity that part of the property mortgaged is the undertaking of the company itself. The debenture-holders might, of course, refuse to perform or to enforce the contracts to which the company was a party, or to use any of its assets for the continuance of its business or in discharge of its liabilities. In their own interests they do not act thus, but, on the contrary, keep the business alive. It is the consequences of their own carrying on the business in this way that we have here to consider, and not merely the ordinary incidents in a case of mortgagees taking possession of the mortgaged property. The business that is thus continued is the business of the company. That this is so is evident. The receiver has the right, if he thinks fit, to fulfil or enforce, as the case may be, the contracts existing with the company. In doing so there is no question of novation. That would make his right so to do contingent on the consent of the other contracting party. It follows, therefore, that the entity that is a party to the contracts must be the same as before the enforcement of the security, that is to say, must be the company. And this is rendered evident also by the form of the order which the Court makes at the request of the debenture-holders, which is dated January 15, 1909. Under it the plaintiff is appointed "to manage the business and undertaking of the defendants Ind, Coope & Co., Limited." In my opinion the word "manage" there is used in its ordinary sense. I know no other meaning, and the context indicates no other meaning that it can bear. So far as the business of the company is concerned, Mr. Whinney is in the same position, and has the same powers, that the manager of the business of a company would have if he were appointed by the company itself. It is well settled that these do not include the power of borrowing money without express authority, but that does not, in my opinion, detract from the accuracy of the proposition. No doubt, as I have said, most important differences arise if a person attempts to enforce legal rights against the company. The company is in the position of one that is carrying on business entirely with money and goods that do not belong

to it, but which are, so to speak, lent to it for the purpose of carrying on its business. But transactions with regard to such money and goods falling within the ordinary scope of business transactions such as the manager of a company would have the power to direct or to carry out are just as valid as they would be if the money and goods still belonged to the company. He can sell and buy, and he can use the plant and premises that form part of the security for the purpose of carrying on the business, and that business remains the business of the company, although the whole beneficial interest in it may have passed to the debenture-holders. In so doing he may, for instance, dispose of goods, and the transaction, if within his powers as manager and fully completed, cannot be impeached. Sale is only one of the business operations within his authority. He can also make contracts as to goods which create a lien, and once the lien has attached, it is as good as though the company had created it before his appointment.

This being so, the letter of January 13 has, in my opinion, precisely the same effect, so far as the validity and effect of the transaction to which it relates are concerned, as if the words "by Arthur F. Whinney, receiver and manager," did not appear therein. The consignment to which it refers was made by Ind, Coope & Co., Limited, and by nobody else, and the addition of the words "receiver and manager" simply points to the fact that the plaintiff has authority to carry on the business of the company, and that he is acting in pursuance of that authority. For these reasons I am of opinion that there was an identity between the shipper of these goods and the shipper of the previous consignments to which the lien refers. In all cases the shipper was Ind, Coope & Co., Limited, and no one else.

I do not consider it necessary to deal with the question of the difference between the position of a receiver and manager appointed by the Court and one appointed by the debenture-holders under powers contained in the trust deed. These matters may be important when we have to consider the nature and extent of the legal rights and remedies possessed by those who contract with the company and the mode in which they can be enforced by application to the Courts. But here we are only

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concerned with the authority of the receiver and manager, and not with his responsibilities. The defendants did not require to come to the Courts to ask for their aid. If I am right in holding that the plaintiff was duly authorized to act as manager of the business of Ind, Coope & Co., Limited, and as such lawfully consigned these goods for shipment to the defendants in the name of the company on the terms of the bills of lading, the defendants acquired the lien claimed, and it is quite immaterial from whom or by what procedure the plaintiff obtained that authority or what were the legal responsibilities he incurred by acting on it. To displace the lien you must shew that he had no right to act as manager of that business, that is, you must challenge the validity of the order of the Court which expressly authorizes him so to do. I shall therefore not discuss the cases which bear on the position and responsibilities of and rights of action against receivers and managers, only adding that in my opinion the decision in *Reid* v. *Explosives Co.* (1) turned on the special circumstances of that case (as is evident from the judgments delivered) and does not justify the general proposition enunciated in the head-note to that case. Such proposition is quite inconsistent with the law as laid down in the later case of *In re Marriage, Neave & Co.* (2) Lindley L.J. there lays down the true principle that the receiver and manager is there to carry on the business of the company, and that he does not oust the company, and that it is not his function to break any contracts of the company. To my mind the appointment by the Court of a receiver and manager of a company has in itself no more effect on any contract of the company or on the continued identity of the business of the company than a change of manager would have were it brought about by any other means, including the voluntary act of the company.

The last argument on behalf of the plaintiff to which it is necessary for me to refer is that the lien asserted cannot be supported because it would have been ultra vires on the part of the plaintiff to ship goods on terms involving such a lien in view of the fact that the whole property of the company had passed to the debenture-holders. The argument was expressed in the

(1) (1887) 19 Q. B. D. 264. (2) [1896] 2 Ch. 663, at p. 672.

following way. The lien has the effect of making the shipowners secured creditors in respect of past unpaid freights, and this is a preference which the plaintiff could not give to them. I fail to understand this argument. For the purpose of considering its validity we must assume that the language of the bill of lading makes the giving of the lien a condition of carrying the fresh consignment. The transaction is therefore an ordinary business transaction. The plaintiff procured the carriage of the goods on known terms, and he must abide by those terms. There is no question here of the plaintiff being taken by surprise or of his not knowing the contents of the bill of lading. He wished for the purpose of the business which he was carrying on to send the goods to Malta, and the terms on which the defendants were prepared to carry those goods are expressed in the bill of lading. He chose to accept those terms, and I have no doubt that he could have got the goods carried on no other terms, because shipping lines will not deviate from their recognized form of bill of lading. This being so, it is to my mind utterly immaterial whether or not the effect of the terms is favourable or not to the defendants in any respect whatever. The plaintiff chooses, as manager, to send goods out on those terms, and the defendants are entitled to have them performed. One is that they have a lien on the goods till certain sums are paid. They are entitled to keep the goods till that is done. For these reasons I am of opinion that the decision of the learned judge was correct and that this appeal should be dismissed with costs.

BUCKLEY L.J. read the following judgment:—The question in this case other than the question of costs is academic—an expression which generally conveys that it is of no practical importance to anybody—unless the facts are, as I understand is the case, that the shipowners' remedy against the company as debtors is not worth 20*s.* in the pound. Under these circumstances the contest is really whether the shipowners, being unsecured creditors for unsatisfied freight, have, by virtue of this transaction with the receiver, become creditors holding a security upon the goods. If they have, they rank for payment, not only in priority to the other unsecured creditors of the

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company, but also to the debenture-holders who have taken possession.

Two questions do or may arise, namely, first, whether Mr. Whinney did by this transaction give the defendants security, and, secondly, whether, if he purported to do so, he could do so without having obtained the leave of the judge. An answer in the negative to either of these two questions will determine the appeal in favour of the appellant. In my opinion both are to be answered in the negative.

The defendants by their letters of January 25 and 29 claimed that they were entitled to a lien on the goods to recover the amount of the unsatisfied freight. A common law lien, of course, they could not have. The contention was that they had become contractually entitled to a lien or security upon the goods by virtue of clause 3 in the bill of lading. Mr. Whinney by his letter of January 30 asked the defendants to allow the goods to go forward, leaving the question which the defendants had raised to be settled afterwards, and to this course the defendants agreed.

In these circumstances the action was brought, it is true, to recover the 171*l.* that was paid, but the rights are to be determined exactly as if the goods had not been released, and the plaintiff were suing to recover the goods, which claim the defendants were resisting upon the ground that for the purposes of the security the goods were theirs.

Under these circumstances what is the answer to the first question, namely, whether Whinney by this transaction gave the defendants security? It is not immaterial—although of course it does not decide the question—that, if he did, he was clearly guilty of a breach of duty. It might have been expedient in the interests of the debenture-holders to have paid a debt for which they were not liable, because such an act would further their interest in the company's undertaking. But there is no suggestion of any facts to lead to the conclusion that this was so, and, even if it had been so, still the second question would then have arisen, which I postpone for the moment. What Mr. Whinney did in fact was to give the order contained in the letter of January 13 and to ship the goods upon the terms of the

bill of lading. I agree that the company were in this transaction the consignees, but not in the sense in which the defendants seek to affirm that they were such. The debenture-holders had intervened and, by a receiver appointed by the Court, had taken possession. The shipper was not the mortgagor company, but the mortgagees by their receiver dealing with the assets of the company. The defendants had notice that this was so by the very terms of the letter of January 13. The persons to whom the ale was to be delivered were there described as Ind, Coope & Co., Limited, but that was the same Ind, Coope & Co., Limited, who signed the letter above, and was that company by Mr. Whinney as receiver and manager. The shipper and the consignees were the same person, and that person was not the mortgagor, but the mortgagees by their receiver. Assuming then that clause 3 of the bill of lading is for all purposes to be read as forming part of the contract, there was no previously unsatisfied freight due from the mortgagees or from Mr. Whinney, the receiver, acting for them.

Mr. Scott has urged that the defendants knew only that Mr. Whinney was receiver and manager, and not that he was a receiver and manager appointed by the Court. From this he seeks to evolve the proposition that they must have been dealing with him as agent for the mortgagor company as distinguished from the mortgagees who had by him taken possession. The contention is not, I think, well founded in fact. Moreover, apart from this, Mr. Whinney's powers would not be enlarged by the fact, if it existed, of the defendants' ignorance. The point could result only in personal liability in Mr. Whinney, and not in the creation of a security upon the goods, if upon other grounds no such security existed. In my judgment, therefore, the defendants did not, by reason of the shipment made by the mortgagees, obtain a contractual lien or security upon the goods for the unsatisfied freight due from the mortgagors.

But secondly, if I am wrong in the above and the transaction was one which would create a security, it could not do so in law by reason of the fact that the receiver could not, without the leave of the Court, bind the debenture-holders by such an act. Mr. Scott has urged that this point is not open upon the pleadings.

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I cannot see that this is so. The plaintiff sues to recover the 171*l.* That in substance affirms that the defendants had not a security upon the goods. Both his writ and his statement of claim disclose that he was suing as receiver and manager appointed under an order of the Court. It was for the defendants, if they were going to raise the contention, to set up that he must fail to recover because they had a security, and for that purpose it was for them to allege that he had obtained the leave of the Court which was necessary to give validity to such a security. How can it lie in the defendants' mouth to say that, because they did not plead that such leave was given, the plaintiff must fail because the fact is that leave was not given? The plaintiff is, I think, entitled to succeed upon the ground that the receiver neither could nor did create in favour of the defendants any lien by contract extending to the unsatisfied debt of the mortgagor company. The appeal must be allowed, and judgment entered for the plaintiff with costs, including the costs of this appeal.

Appeal allowed.

Solicitors for plaintiff: *Davidson & Morriss.*

Solicitors for defendants: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

E. L.

[IN THE COURT OF APPEAL.]

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June 17, 18, 20, 21; *July* 20.

BRISTOL TRAMWAYS, &c., CARRIAGE COMPANY, LIMITED *v.* FIAT MOTORS, LIMITED.

Sale of Goods—Contract—Warranty—Implied Condition as to Fitness—Merchantable Quality—Patent or Trade Name—Evidence—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 14, *sub-ss.* 1 *and* 2.

Under a contract in writing which contained no mention of the particular purpose for which they were required, the plaintiffs bought "the 24/40 h.p. Fiat omnibus" they had inspected and "six 24/40 h.p. Fiat omnibus chassis" at an agreed price. The articles when delivered were not fit to perform the work required of them. In an action for damages:—

Held, that this was not a contract for the sale of a specified article under its patent or trade name, and that there was an implied condition that the goods should be reasonably fit for the purpose for which they were required within s. 14, sub-s. 1, of the Sale of Goods Act, 1893, and also that they should be of merchantable quality within sub-s. 2 of the same section, and consequently that the plaintiffs were entitled to recover damages for breach of the contract.

The proviso at the end of sub-s. 1 of s. 14 assumes the absence of any express assurance by the seller and deals only with the case of express or implied information by the buyer of the purpose for which he requires the article, so framed as to shew that he relied on the seller's skill or judgment, but the seller is not bound to refrain from carrying out his order for a particular article because it is ill adapted for the purpose mentioned in the order, provided the article has in fact a patent or trade name under which it can be ordered.

The condition implied by sub-s. 2 of s. 14 that the goods are of merchantable quality applies to all goods bought from the seller who deals in goods of that description whether they are sold under a patent or trade name or otherwise.

Appeal from a judgment of Lawrance J., sitting without a jury, which raised a question on the construction of s. 14 of the Sale of Goods Act, 1893.

On February 14, 1906, the plaintiffs entered into a contract for the purchase of a Fiat motor omnibus by a letter of that date as follows: "Please supply us with the 24/40 h.p. Fiat omnibus complete with body tyres lamps &c. complete for

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the road, which we inspected, at the price of 850*l.*" By a second letter of the same date, addressed to the defendants and signed by the manager of the plaintiff company, the plaintiffs contracted as follows: "Please supply us with six 24/40 h.p. Fiat omnibus chassis without tyres at the price of 650*l.* each, three for delivery in April and three in May."

These orders were duly accepted by the defendants by a letter of February 16. During the trial an amendment in the pleadings was allowed for the purpose of raising the question of a verbal warranty at an interview between the plaintiffs and the defendants' manager. There was some delay in the delivery of the chassis, and the plaintiffs alleged that the omnibus and chassis, when delivered, were so unfit and unsatisfactory that after making every effort to keep them running they had been compelled to lay them up until they could be reconstructed. The present action was therefore brought, claiming damages for delay in the delivery, expenses for repairs and renewals, estimated cost of reconstruction, and time lost by breakdowns.

After a trial lasting some eight days, Lawrance J. found as a fact that the plaintiffs fully made known to the defendants the particular purpose for which the omnibus and six chassis were required, namely, for the conveyance of passengers in motor omnibuses in and near Bristol, a heavy traffic in a hilly district. He also found in regard to the contracts, (1.) That the buyers relied on the defendants' skill and judgment to supply goods which should be free from the defects which the plaintiffs had experienced in the case of certain other omnibuses they had recently purchased. (2.) That the goods were of a description which it was in the course of the sellers' business to supply. (3.) That in regard to the omnibus an examination of it by the plaintiffs' assistant traffic manager on a visit to London shortly before the date of the contract was not such as to enable the plaintiffs to discover the defects in that omnibus. (4.) That the omnibus and six chassis were unfit for the purpose for which they were bought by the plaintiffs and at different dates broke down and became useless. (5.) That thereby great loss and expense in repairs and reconstruction amounting altogether to 2000*l.* was caused to the plaintiffs. (6.) That the defects occasioning

these losses and expenses were not due to any mismanagement or want of skill on the part of the plaintiffs' servants.

Judgment was accordingly given for the plaintiffs for 2360*l.* and costs.

The defendants appealed. The appeal was heard on June 17, 18, 20, and 21.

The chassis were not manufactured by the defendants, but by an Italian firm, but the question of damages for delay was not argued, the main question on the appeal being whether under s. 14, sub-s. 1, of the Sale of Goods Act, 1893, as the defendants knew the plaintiffs were a company requiring these articles for the purposes of their business, there was an implied term in the contract that the omnibus and chassis should be of merchantable quality and reasonably fit for the aforesaid purposes, and should be free from defects rendering them unfit for use in the ordinary manner as a motor omnibus or as chassis for motor omnibuses.

Lush, K.C., and *W. Whately*, for the appellants. There is no implied warranty of these goods. The evidence shews that the plaintiffs relied on the skill of the manufacturers, who are the Italian firm, as the plaintiffs knew. What was ordered was a Fiat omnibus and six Fiat chassis, specified articles under their trade name. The proviso at the end of s. 14, sub-s. 1, of the Sale of Goods Act, 1893, applies, and consequently there was no implied condition as to the fitness of these specified articles for the particular purpose for which they were wanted. The articles delivered did in fact answer the description of them in the contract, and none the less so because the defects were patent, latent, or discoverable: *Randall* v. *Newson*. (1) The particular articles ordered by the contract having been delivered, there was no implied warranty that they should be fit for the purposes of the plaintiffs' traffic: *Chanter* v. *Hopkins* (2); *Ollivant* v. *Bayley*. (3) In *Gillespie Brothers & Co.* v. *Cheney, Eggar & Co.* (4) the article ordered was coal, which is quite different from a manufactured article like a motor chassis or a mowing machine.

(1) (1877) 2 Q. B. D. 102, 109.
(2) (1838) 4 M. & W. 399.
(3) (1843) 5 Q. B. 288.
(4) [1896] 2 Q. B. 59.

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[*Paul & Co.* v. *Corporation of Glasgow* (1) was also cited on this point.]

Evidence of any verbal warranty is not admissible; evidence trenching on the same ground as the written contract must be excluded. In any case the evidence relied on is antecedent to the date of the written contract. The substance of this contract was that the plaintiffs agreed to buy the particular motor omnibus that they had seen, and six more like it were ordered, with the result that they bought articles then in an experimental stage which were not strong enough for the purpose for which they were required, but there was no implied warranty that they should be fit for this purpose. The different branches of implied warranty are discussed in *Jones* v. *Just.* (2) If any warranty is to be implied at all, the Court must find out what the warranty was, and for this purpose regard must be had to the state of knowledge of the trade as to motor omnibuses in February, 1906; "reasonably fit" must mean reasonably fit under the circumstances existing at the time of the contract.

Simon, K.C., and *Leck*, for the plaintiffs, the respondents. All questions arising under ss. 14 and 15 of the Sale of Goods Act, 1893, are questions of fact; therefore, unless the judge has misdirected himself, this Court cannot interfere with his findings of fact. There is ample evidence here to justify all the judge's findings. As to s. 14, sub-s. 1, the "particular purpose" for which these goods were required was made known, and it is clear on the evidence that the buyer relied on the seller's skill or judgment, and that the goods were of a description which it was in the course of the seller's business to supply; that is admitted; therefore there was an implied condition that the goods should be reasonably fit for the purpose for which they were required. The proviso does not apply, because these articles were not sold under a patent or trade name; all motor cars have some maker's name attached to them to distinguish the different types of engines, bodies, &c., but they are not sold under a trade name. The defects which existed in these chassis were not such that an examination ought to have revealed them within the proviso to sub-s. 2. Under

(1) (1900) 3 F. 119. (2) (1868) L. R. 3 Q. B. 197.

sub-s. 2 the goods bought were of a definite description; therefore there was an implied warranty that they should be of "merchantable quality," and they were not. As motor omnibus chassis they were not reasonably fit for the purposes for which they were designed, i.e., "merchantable": *Shepherd* v. *Pybus*. (1) The plaintiffs therefore succeed under sub-s. 2. There is evidence that the defendants knew the purposes for which these chassis were required, and there was a verbal warranty as well, that the articles ordered would be fit for these purposes. Upon a sale of goods of a specified description, the goods must not only answer that specific description, but must be merchantable under that description: *Drummond* v. *Van Ingen*. (2) [*Beer* v. *Walker* (3) was also cited.]

Lush, K.C., in reply. *Chanter* v. *Hopkins* (4) really disposes of this case. If the purchaser asks for a particular article and gets it and it will not work, so much the worse for him, but he has no remedy against the seller.

[FARWELL L.J. With reference to s. 14, sub-s. 1, if the buyer makes it known that he relies on the seller's skill or judgment when buying a specified article under its trade name, does the proviso apply to this transaction?]

The reliance on the seller's skill is the inference drawn as to what is in the mind of the buyer; because the particular purpose for which the goods are required is made known, it does not follow that reliance is placed on the seller's skill or judgment, i.e., it is not of itself an indication that reliance is placed on his skill. You must not mix up express warranty with implied warranty; this sub-section deals only with implied warranty, and the proviso must be an exception upon the earlier part of sub-s. 1. When you buy a patented article there is no warranty at all. In *Shepherd* v. *Pybus* (1) the barge was for any useful purpose not a barge at all. This is not a case of the omnibus or chassis not being an omnibus or chassis at all; it is not a case where there is a complete difference in substance between the thing bargained for and that obtained so as to constitute a failure in the consideration as discussed in *Kennedy* v. *Panama*,

(1) (1842) 3 Man. & G. 868.
(2) (1887) 12 App. Cas. 284, 291.
(3) (1877) 46 L. J. (Q.B.) 677.
(4) 4 M. & W. 399.

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&c., Mail Co. (1) Sub-s. 2 of s. 14 deals with articles that are not sold under a patent or trade name and does not apply to the present case. There is no evidence to shew that the buyers did communicate "the particular purpose" to the sellers so as to shew that they relied on their skill or judgment.

Cur. adv. vult.

July 20. COZENS-HARDY M.R. This is an action in which the plaintiffs claim damages in respect of seven Fiat motor omnibuses sold by the defendants to the plaintiffs. The learned judge, Lawrance J., who tried this case without a jury, has held that the omnibuses as delivered were not fit to perform the duty required of them, and that the plaintiffs made fully known to the defendants the particular purpose for which the omnibuses were required, and that they relied upon the defendants' skill and judgment in the matter.

The case really turns upon s. 14 of the Sale of Goods Act, 1893. I rather deprecate the citation of earlier decisions such as *Chanter* v. *Hopkins* (2) or *Shepherd* v. *Pybus*. (3) The object and intent of the statute of 1893 was, no doubt, simply to codify the unwritten law applicable to the sale of goods, but in so far as there is an express statutory enactment, that alone must be looked at and must govern the rights of the parties, even though the section may to some extent have altered the prior common law.

Turning to s. 14, it is plain that the defendants were told that the omnibuses were required for heavy passenger traffic at Bristol. I am disposed to think that such a statement of purpose suffices to shew that the buyer relied upon the seller's skill or judgment without any further evidence on the point, but, however that may be, I think there was in the present case ample evidence that the plaintiffs did rely upon the defendants' skill or judgment. This being so, there was an implied condition that the omnibuses should be reasonably fit for the declared purpose, unless the defendants can rely upon the proviso at the end of sub-s. 1 of s. 14.

(1) (1867) L. R. 2 Q. B. 580. (2) 4 M. & W. 399.
(3) 3 Man. & G. 868.

That proviso is as follows: "Provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose." Now the orders in the present case are in writing. The first was for a 24 to 40 horse power Fiat motor omnibus complete, which had been run from London to Edinburgh, and which the representatives of the plaintiffs saw for a short time. The other order was for six 24 to 40 horse power Fiat motor omnibus chassis. In my opinion neither of these orders falls within the proviso. It was not a contract for the sale of a specified article under its patent name, nor was it under its trade name.

It is to me plain from the evidence that at the time when these contracts were entered into a Fiat omnibus was not a trade name. It no doubt meant an article sold by the defendants, an English company, and manufactured by an Italian company having intimate business relations with the English company, but the whole design and structure and arrangement of the Fiat omnibus was a matter of uncertainty according as the makers might from time to time consider improvements to be desirable. The defects in the omnibuses sold were apparently due to their being too slightly built, and being suitable for touring purposes rather than for heavy traffic. The term "trade name" applies to a case such as that which was before us a few days ago where "Anti-formin" was sold to brewers.

I think, therefore, that on the findings of fact by the learned judge there was an implied condition that the goods should be reasonably fit for the purpose. I also think that the case may be brought within sub-s. 2, namely, that there was an implied condition that the goods should be of merchantable quality. In the face of Mr. Preen's report of October 25, 1907, which comes from the defendants' custody, I cannot doubt that the goods sold were not of merchantable quality within the fair meaning of those words, and I see no reason to doubt the finding of the learned judge that the slight inspection by the representatives of the plaintiffs of one of the complete omnibuses was not of such a nature as sufficed to disclose the defects.

In my opinion there is no ground for interfering with the

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judgment of the learned judge, and the appeal must be dismissed with costs.

FARWELL L.J. I think that it is impossible to interfere with any of the findings of fact of the learned judge. I understand that he has not found any express contract of warranty, although he gave leave to amend by pleading such a contract. At any rate I am of opinion that evidence of such a contract as was alleged by the amendment is inadmissible. There are, no doubt, cases where evidence may be given to shew that a contract was entered into in consideration of a collateral antecedent contract between the parties, as in *Erskine* v. *Adeane* (1) and *Morgan* v. *Griffith* (2), but no subsequent contract, founded only on the same consideration as the principal contract, can be given in evidence, for it obviously cannot form the consideration of the main contract, which was complete before it came into existence, and it cannot add to or vary that contract without infringing the elementary rules of evidence, and unless it can form part of such contract it has no consideration to support it. There may be cases in which a contract has to be extracted from a long correspondence, in which case the whole of it must be considered, as in *Hussey* v. *Horne Payne* (3); but when the contract is expressed in a formal document or in a letter of offer and a letter of acceptance, no antecedent or subsequent negotiations are admissible to construe such contract: see Lord Blackburn's speech in *Inglis* v. *Buttery*. (4) The present case, therefore, resolves itself into the question whether there is any implied warranty on which the plaintiffs can recover damages. In order to carry into effect the true intention of the contracting parties the Courts for many years held that certain warranties or conditions were implied in certain contracts, and these have now been codified in the Sale of Goods Act, 1893, those that are material for the present case being (1.) reasonable fitness for the purpose for which the goods are purchased, and (2.) merchantable quality. On (1.) the learned judge's findings are conclusive in the plaintiffs' favour, unless the proviso in

(1) (1873) L. R. 8 Ch. 756.
(2) (1871) L. R. 6 Ex. 70.
(3) (1879) 4 App. Cas. 311.
(4) (1878) 3 App. Cas. 552, at p. 577.

s. 14, sub-s. 1, applies. This is a question of considerable difficulty, but I have come to the conclusion that he was right in holding that it does not apply. The reason of the exception in the proviso is plain. If a man orders in express terms an article known by a patent or trade name under that name, and gets it, he cannot complain that it will not answer some specific purpose for which he wanted it, even although he told the vendor before he ordered it the purpose for which he required it. The proviso assumes the absence of any express assurance by the seller and deals only with the case of express or implied information by the buyer of the purpose for which he requires the article, so framed as to shew that the buyer relied on the seller's skill or judgment; e.g., if he asked for A.'s patent safety shaving machine, he cannot complain if he gets it, even although he added that the purpose for which he required it was to cut cheese; it was open to him to make an express condition if he desired that it should cut cheese, but the seller is not bound to refrain from carrying out his order for the machine because it is ill adapted for, or even wholly incapable of, effecting the purpose mentioned in the order. But this must, in my opinion, be confined to articles which have in fact a patent or trade name under which they can be ordered. By A.'s patent shaving machine I mean a known article dealt in under that name; but at the time when the omnibus and the chassis were ordered in this case there was nothing that could properly be called a Fiat omnibus or a Fiat chassis: the industry was in the tentative stage, and the order was really for the particular omnibus and the chassis to be completed and made respectively by the Fiat Company on such lines and patterns as that company should find expedient for the purpose. It is one thing to order an article known as a Fiat omnibus, an order which is intelligible only if there be such an article known to the public or the trade; it is quite another thing to order an omnibus to be made by the Fiat Company, although in the latter case that company might adopt patterns and devices which were its own exclusive property: the former is within the proviso, the latter is not. An omnibus made by the Fiat Company may well be described as a Fiat omnibus, but such nomenclature does not

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necessarily constitute a trade name within the Act; if it did, a manufacturer could always get the benefit of the proviso by labelling all the goods made by him with his own name. A trade name has to be acquired by user, and whether it has or has not been so acquired is a question of fact in each case. In the present case Lawrance J. has found that it has not, and I see no reason to differ from him. The real substance of the transaction was that the plaintiffs required the defendants to provide them with omnibus and chassis that would work in Bristol, and the defendants undertook to supply them, and both parties understood that they were to be reasonably fit for the purpose. For this purpose I do not think that the English and the Italian companies can be fairly distinguished; no evidence was given of the arrangements between them, and the plaintiffs were entitled to treat the defendants as if they were the manufacturing company.

Further, there is the second exception in clause 14 on which Lawrance J. has also found in the plaintiffs' favour, and to this the proviso to the first exception does not apply. The implied condition that the goods are of merchantable quality applies to all goods bought from a seller who deals in goods of that description, whether they are sold under a patent or trade name or otherwise; the only proviso in sub-s. 2, namely, examination by the buyer, is negatived by Lawrance J.'s finding of fact in this case. The phrase "merchantable quality" seems more appropriate to a retail purchaser buying from a wholesale firm than to private buyers, and to natural products, such as grain, wool, or flour, than to a complicated machine, but it is clear that it extends to both: the definition of "goods" in s. 62 makes that word include "all chattels personal other than things in action and money," and "quality of goods" includes their state or condition. And this is in accordance with the older cases, e.g., in *Laing* v. *Fridgeon* (1), where it was held that in every contract to furnish manufactured goods, however low the price, it is an implied term that the goods shall be merchantable. In *Gardiner* v. *Gray* (2) Lord Ellenborough says: "The intention of both parties must be taken to be that it shall be saleable in the

(1) (1815) 6 Taunt. 108. (2) (1815) 4 Camp. 144.

market under the denomination mentioned in the contract between them; the purchaser cannot be supposed to buy goods to lay them on the dunghill." The phrase in s. 14, sub-s. 2, is, in my opinion, used as meaning that the article is of such quality and in such condition that a reasonable man acting reasonably would after a full examination accept it under the circumstances of the case in performance of his offer to buy that article whether he buys for his own use or to sell again. It is not, as Mr. Lush argued, a case of the omnibus or the chassis not being omnibus or chassis at all, so that the reasoning of Lord Blackburn in *Kennedy* v. *Panama, &c., Mail Co.* (1) and the illustration of æs pro auro or beans for peas would apply; but it is like the case of *Shepherd* v. *Pybus* (2), where it was held that there was an implied warranty that the thing sold was reasonably fit for the use for which it purported to be designed, even although there is no warranty that it is reasonably fit for the particular purpose for which the purchaser required it: it might well be, and was in fact held, that the barge was so unmerchantable as not to be fit for use as a barge, irrespective of any particular purposes for which the purchaser required her. In the present case the materials used, especially as regards the size and strength of necessary fittings, were not of merchantable quality, as appeared by Preen's report. It is as though a man bought the patent shaving machine to which I have already referred by way of illustration and found that the blades would not fit the frame or that the frame broke from the brittleness of the metal used. The purchaser would in such a case be entitled either to return the article, or, if he had accepted it within s. 35, to bring his action for breach of warranty under s. 11, not because he has not got a shaving machine at all, although it would not shave, but because the machine that was delivered was not of merchantable quality.

I agree that this appeal should be dismissed with costs.

KENNEDY L.J., after referring to the question of damages for delay which was not argued on the appeal, and having stated the contracts and the findings of Lawrance J. as already set out,

(1) L. R. 2 Q. B. 580. (2) 3 Man. & G. 868.

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continued:—The defendants' counsel have not, in my judgment, shewn any sufficient cause for dissatisfaction with any of these findings of fact. If they stand, the issue to be decided between the parties on the present appeal depends upon the proper application to these contracts of s. 14, sub-ss. 1 and 2, of the Sale of Goods Act, 1893, and the arguments in this Court were conducted upon this basis.

In regard to s. 14, sub-s. 1, it is clear upon the facts as found by the learned judge that the plaintiffs are entitled to succeed, unless, as the defendants contend, the proviso of that sub-section is applicable to the present case. Was either the contract for the sale of the "24/40 horse power Fiat omnibus complete," or the contract for "six 24/40 horse power Fiat omnibus chassis," a contract "for the sale of a specified article under its patent or other trade name" within the meaning of that proviso? In my opinion it was not. There was not at that time any specified article known as a 24/40 horse power Fiat omnibus or a 24/40 horse power Fiat chassis. The expression, to put the same thing in a rather different way, did not connote a particular uniformly constructed piece of machinery as a patent smoke-consuming furnace did in one of the cases referred to. On the contrary, the correspondence shews that the defendants through their communications in respect of these six chassis with their Italian manufacturing firm were busy in altering the design from time to time. Indeed, it was by the importance and radical nature of such alterations that the defendants sought to excuse their delay in making deliveries until after the contract dates. What the plaintiffs contracted for was the supply in one case of an omnibus, in the other case of six chassis, reasonably fit to perform a certain class of work, and, as they were led by the defendants' recommendation and the reputation of the non-stop run from London to Edinburgh to trust the workmanship of the Fiat Company, to be made for them by that company. In a sense, indeed, the defendants were themselves to be the manufacturers, for in their letter of February 5, 1906, they described the chassis which they recommended as "our 24/40 horse power motor bus chassis." It appears to me that in contracting with the defendants that the mechanism, which, as they made known

to the defendants, the plaintiffs required for a particular purpose, should be manufactured by the Fiat Company, the plaintiffs did no more than a buyer of a steam engine which shall be reasonably fit to effect a particular work does when he stipulates with the seller who contracts to supply such an engine that it shall be an engine made by some specified manufacturer of repute. I do not think such a case falls within the proviso of s. 14, sub-s. 1.

The plaintiffs also rely upon s. 14, sub-s. 2, and say that the omnibus and chassis were not of merchantable quality. The point is taken in the statement of claim, and the judgment of Lawrance J. expressly negatives the applicability of the proviso as to the revelation of defects to the plaintiffs at the time when the omnibus was inspected by the plaintiffs' assistant manager. But the learned judge does not expressly find that the articles delivered under the contracts were of unmerchantable quality, which is, of course, a result which is not necessarily involved in the finding that they did not fulfil the conditions of reasonable fitness under s. 14, sub-s. 1, for the particular purpose for which the buyer required them. An article may be of merchantable quality and yet not fulfil the special condition of fitness for the particular purpose for which the article was bought, and upon which the purchaser may insist under s. 14, sub-s. 1. I feel some doubt as to the propriety of holding that the omnibus and chassis were not merchantable as a Fiat omnibus and Fiat chassis, the chief cause, at any rate, why they failed to fulfil the condition of fitness being, as the learned judge states, that their machinery was not adapted for the heavy work of the Bristol traffic. For light work they might have been sufficient. In these circumstances I prefer to base my affirmance of the judgment on the breach by the defendants of the condition of fitness for particular work under s. 14, sub-s. 1.

Appeal dismissed.

Solicitors: *Amery-Parkes, Macklin & Co.; Stanley, Wasbrough, Doggett & Baker, for Stanley, Wasbrough & Doggett, Bristol.*

W. C. D.

K. B. D.
1909
Dec. 9, 20.
C. A.
1910
June 29, 30;
July 8.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

MOEL TRYVAN SHIP COMPANY, LIMITED *v.* ANDREW WEIR & CO.

Ship—Charterparty—Non-arrival by fixed Date—Date for Exercise of Option to cancel Charterparty.

The plaintiffs chartered to the defendants a ship which was to go with all convenient speed to Newcastle, New South Wales, and there load a cargo of coals which the freighters bound themselves to ship. The defendants had the option to cancel the charterparty if the ship had not arrived ready to load at Newcastle by December 15, 1907. The ship was detained and did not arrive at Newcastle till June 15, 1908, whereupon the charterers cancelled the charterparty. Meanwhile the plaintiffs had called upon the defendants to exercise as soon as December 15 had passed their option to cancel. The defendants refused to do so, and the plaintiffs brought this action for damages for breach of contract on the ground that the defendants ought to have exercised their option as soon as December 15, 1907, had passed and they had been called upon to do so, or within a reasonable time afterwards; and that inasmuch as they had declined to elect within a reasonable time from that date the option was gone:—

Held by Bray J. and by the Court of Appeal, that the owners were bound to send the ship to Newcastle; that there was nothing to shew that the charterers were not to have the full benefit of that obligation because the ship could not get there by the named date; and that the charterers could not be called upon to exercise their option to cancel the contract until the ship had arrived at Newcastle.

By a charterparty dated March 18, 1907, the Moel Tryvan Ship Company, Limited, chartered their ship *Langdale* to Messrs. Andrew Weir & Co., and it was provided by the charterparty "that the said ship, being tight staunch and strong and in every way fitted for the voyage, shall with all convenient speed after discharge of inward cargo on the West Coast of South America sail and proceed to Newcastle, New South Wales," and there in the usual and customary manner load from any collieries "the said freighters may name a full and complete cargo of coals which the said freighters bind themselves to ship . . . ." There was the usual clause excepting certain perils and accidents, and the charterparty also contained

the following provision:—"The charterers or their agents have the option of cancelling this charterparty provided the ship is not arrived ready to load as within described at Newcastle, New South Wales, by the 15th December, 1907." The *Langdale* was detained at Buenos Aires and did not arrive at Taltal till December 30, 1907. On November 28, 1907, the owners wrote to the charterers regretting the delay which made it impossible for the ship to get her dates at Newcastle, New South Wales, and asking what was their decision with regard to the charter. The charterers in reply declined to say anything regarding the *Langdale*. Further correspondence followed, and the charterers refused to exercise their option and required the owners to send the ship to Newcastle in accordance with the charterparty. The owners refused to do so, but afterwards changed their minds and sent her. She arrived at Newcastle on June 15, 1908, and on her arrival the charterers exercised their right to cancel the charterparty, and refused to load her. Freights had fallen, and the owners were only able to employ the ship at a lower freight. The owners brought an action against the charterers for damages for breach of contract. The defendants referred to the cancellation clause and said that they had exercised their option and cancelled the charterparty as they were entitled to do on the arrival of the ship at Newcastle, New South Wales. The plaintiffs contended that the defendants could only exercise their option to cancel within a reasonable time after December 15, 1907, and that, they not having exercised their option when called upon to do so, the option was gone. The action was tried at Liverpool on December 9, 1909, before Bray J. without a jury.

Horridge, K.C., and *G. D. Keogh*, for the plaintiffs.

Leslie Scott, K.C., and *W. Norman Raeburn*, for the defendants.

Cur. adv. vult.

1909. Dec. 20. BRAY J. stated the facts, and continued:—The question is thus neatly raised whether the shipowner can

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call upon the charterer to exercise his option before the ship arrives at the loading port, and whether, if the charterer fails to exercise it when called upon to do so, the option is gone. The plaintiffs' contention is that under this charterparty the defendants were bound to exercise their option within a reasonable time after the cancelling date, and failing to do so the option was gone. The defendants contend that this question is really concluded by authority in their favour, and that apart from authority they are right on the true construction of the charterparty. It will be convenient to examine the authorities. The first is the case of *Shubrick* v. *Salmond* (1), decided by Lord Mansfield and Wilmot J. in the year 1765. The action was by the charterers against the shipowner for breach of contract in not sending the ship to the port of loading, and the question arose on demurrer to two pleas of the defendants. The cancelling clause was not in the same form as here, for it was expressly provided that the charterer might exercise the option to cancel after the ship's arrival. The importance of the decision was that the Court held that there was an absolute covenant by the shipowner to sail the ship to the port of loading and that the proviso for cancelment could not excuse him for not going because he could not get there by the cancelling date, he having expressly covenanted to go to that port. This case was followed by American decisions, *The Samuel W. Hall* (2) and *The Progreso.* (3) In the former case the cancelling clause was practically in the same words as in the present case, and the Court held that the option was to be exercised at the place where the ship was to load, and that the shipowner had no right to call upon the charterer to exercise his option elsewhere. In the latter case the decision was the same, but the cancelling clause provided that the option was to be declared when the ship was ready to load. The question does not seem to have arisen again in the English Courts till the case of *Bucknall Brothers* v. *Tatem & Co.* (4) in the Court of Appeal. In that case the charterer asked for an injunction to restrain the shipowner from employing his ship elsewhere than in sending

(1) (1765) 3 Burr. 1637.
(2) (1892) 49 Fed. Rep. 281.
(3) (1892) 50 Fed. Rep. 835.
(4) (1900) 83 L. T. 121.

her to Bussorah, the port of loading. The cancelling clause provided that the charterers should be at liberty to cancel if the ship was not ready to load at Bussorah by June 18. It was found impossible to send the ship to Bussorah by the time named, and the charterers were called upon to say whether they would or would not load the vessel, and they refused to answer, whereupon the shipowner refused to send the ship there. The Court of Appeal refused the injunction upon the ground that the charterers, the plaintiffs, would have their remedy in damages, and that the charterers had so acted as to disentitle them to an injunction. The importance of that case was that A. L. Smith L.J. in his judgment stated that the shipowners were bound to send the vessel to Bussorah and that if they did not send her there they must pay damages, and Vaughan Williams L.J. agreed. As the injunction was refused, the above statement of law was only a dictum, but it was a clear expression of opinion. There was a further decision in the year 1906 in the American Courts in the case of *Karran* v. *Peabody* (1), in the United States Circuit Court, to the same effect, a manuscript report of which has been furnished to me by the parties. These were the only authorities brought to my attention. Cancelling clauses seem to have existed for upwards of 150 years, and in every case, so far as I am aware, that can be found in the books the decision was that the ship must go to the port of loading, and that the charterer could not be called upon to exercise his option before the ship arrived. Mr. Carver in article 222 of his work on Carriage by Sea, 5th ed., states the law thus: "Moreover the shipowner cannot require the charterer to declare his election, whether he will load or not before the ship has arrived at the loading place, although the date for arrival may have already passed." Mr. Scrutton, on p. 87 of his work on Charterparties, 5th ed., states the law thus: "Where there is a cancelling clause, and the ship cannot get to the port of loading by her cancelling date, she is yet bound to proceed, unless the delay by excepted perils is such as to put an end to the charter." But in a note he says, after quoting *Shubrick* v. *Salmond* (2) as an authority for this

(1) (1906) 145 Fed. Rep. 166 (C. C. A.).

(2) 3 Burr. 1637.

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statement of law, "Quære, however, whether now if the shipowner asks the charterer on the cancelling date to exercise his option, the latter must not do so?" No authority is cited by him in support of the query, and I should be very much disinclined to give a decision that would conflict with what seems to be a settled interpretation of the cancelling clause. In *Tharsis Sulphur and Copper Co.* v. *Morel Brothers & Co.* (1) Lord Esher says: "That was decided nineteen years ago, and as it was a decision on a question of frequent mercantile interest, we should not interfere with the decision unless we were fully convinced it was wrong." That expresses my feeling, and the fact that the wording of the cancelling clause has differed in some of the cases does not seem of much importance. If after the decisions I have referred to the parties had wished to provide that the charterer should be bound to exercise his option before the ship arrived at the port of loading, I think they would have inserted an express provision to that effect; but however that may be, I will consider the question apart from authority. Now the contention of the plaintiffs, as I have said, is that there is an implied condition that the option should be exercised within a reasonable time after the cancelling date. It is a settled rule of construction that a term not expressed should not be implied unless it can be clearly seen that the parties must have so intended, and that the insertion of the term will make a more reasonable contract. Now we find that there is in this charterparty an express covenant or promise by the shipowner to go to the port of loading. If he has to do this, why should not the charterer be entitled to wait till the ship arrives before he exercises his option? The option is given for the benefit of the charterer. He is not bound, as Lord Bowen says in *Tharsis Sulphur and Copper Co.* v. *Morel Brothers & Co.* (2), to consider the benefit or otherwise of the other party. He is bound to exercise his option in a reasonable manner, but not so far as appears from the clause in a reasonable time from the cancelling date. He is bound to be ready to load as soon as the ship is ready. That is his earliest obligation, and he must exercise his option before that time arrives subject to this, that the longer the time he has for

(1) [1891] 2 Q. B. 647, at p. 650. (2) [1891] 2 Q. B. 647, at p. 652.

exercising his option the better for him, and if the ship has to go to the loading port, that is the most favourable time for the charterer to exercise his option. These considerations seem to me to afford good reason for not implying the suggested limitation of time. But there are further difficulties in the contention of the plaintiffs. What is a reasonable time? Is the charterer entitled to have time to make inquiries as to where his ship is, and how long it is likely to be before she arrives? Surely he is. Is he entitled to have time to make inquiries as to whether he can obtain another ship at the port of loading and upon what terms? Surely he is. These and other necessary inquiries may take a long time if the port, as it often is, is a distant port; and who can say with any certitude when the reasonable time will have elapsed? When can the shipowner safely say that he is entitled to go elsewhere because the time for exercising the option has elapsed? Would the parties if they considered the matter ever enter into such an uncertain contract? I can understand the parties agreeing that the option must be exercised, say in fourteen days or in any other number of days after the cancelling date, but I cannot imagine them intending to enter into such an uncertain and unbusinesslike contract as is suggested. It is said, on the other hand, "Look at the position of the shipowner. What a hardship it is upon him to have to go to the port of loading when it is perhaps almost certain that the charterer will cancel." There are several answers to this. If freights have fallen he can refuse to go and the damages will be nominal. If it is uncertain whether it will be beneficial to the charterer to exercise his option because the position at the port of loading is uncertain, then that is a good reason for the charterer waiting until he can ascertain his position. Further looking at it from a practical point of view, the risk of the shipowner failing to get his cargo or earn his chartered freight is a risk easily and very commonly insured against. These considerations among others lead me to the conclusion that I ought to imply no such stipulation, and that, finding no express words to limit the time for exercising the option, I ought to hold that the charterers were entitled under this charterparty to exercise this option on the arrival of the

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ship at Newcastle. That being so, the action fails, and there must be judgment for the defendants with costs.

The plaintiffs appealed.

June 29, 30. *Horridge, K.C.*, and *G. D. Keogh*, for the plaintiffs. In the circumstances of this case the charterers ought not to have waited till the ship arrived in New Zealand; they should have exercised the option within a reasonable time after December 15, 1907, the date of non-arrival. They were asked to do so and they declined, and the plaintiffs are entitled to say that the charterparty has come to an end. The plaintiffs admit that, although it had become impossible to get the ship to New South Wales in time, they were bound until cancellation to send her there: *Shubrick* v. *Salmond*. (1) But the question is whether they were not entitled to require the charterers to exercise their option within a reasonable time from the date fixed for arrival, and to say whether they would load or not, although the ship had not arrived at the loading place. It is submitted that as the charterers did not exercise their option then the contract remained in force and they were bound to load. This clause in the charterparty does not say that the option is only exercisable after arrival. There are no English authorities on the point, but it has been held in American cases that the option does not arise under such a clause as this until the ship has actually arrived at the port of loading, and that it extends to a reasonable time after arrival; but those decisions resulted from a misunderstanding of *Shubrick* v. *Salmond* (1), which only decided that where the contract provided that the option should be exercisable on the ship's arrival at the loading port the shipowner was bound to send the ship there although it would be impossible to get her there in time. In *Bucknall Brothers* v. *Tatem & Co.* (2), where the charterer refused to extend the cancelling date or to promise to load the ship when she arrived, the Court of Appeal refused to restrain the shipowner from employing the ship in another way and left the charterer to his remedy in damages. But that decision was

(1) 3 Burr. 1637. (2) 83 L. T. 121.

based on the unreasonable conduct of the charterer and did not lay down any general rule. In Carver's Carriage by Sea, 5th ed., par. 222, it is stated that the shipowner cannot require the charterer to declare his election, whether he will load or not, before the ship has arrived at the loading place, although the date for arrival may have already passed; and in support of that proposition three American decisions are cited, namely, *The Samuel W. Hall* (1); *The Progreso* (2); *Karran* v. *Peabody* (3), in which the rule is spoken of as settled. It is submitted that there is no such rule and those decisions are based on a mistaken view of *Shubrick* v. *Salmond.* (4) It would be equivalent to saying that every such clause must be construed as if it provided that the option should not arise till after arrival at the loading port, although no such words are contained in the contract. A cancelling clause must be exercised in a reasonable way. It is not contended that the charterers must exercise their option for the benefit of the shipowners, but that they must exercise it in a reasonable way, having regard to all the circumstances and to the purposes of the contract. In Scrutton's Charterparties and Bills of Lading, 5th ed., p. 87, note (i), it is said, referring to *Shubrick* v. *Salmond* (4), "Quære, however, whether now if the shipowner asks the charterer on the cancelling date to exercise his option, the latter must not do so? In practice the charterer usually refuses an answer because freights have fallen, and he wants a new bargain with the shipowner under pressure. This may be defeated by refusing to proceed, when the charterer will be unable to prove any damages." The shipowners are not in default; non-arrival on the specified day does not give the charterers any right of action; their only remedy is cancellation. The Court will not introduce into the contract words which are not there unless it is absolutely necessary to add them in order to give effect to the plain and manifest intention of the parties: *Adamson* v. *Newcastle Steamship Freight Insurance Association.* (5) There is no authority for saying that the reasonable time for cancelling must begin from

(1) 49 Fed. Rep. 281.
(2) 50 Fed. Rep. 835.
(3) 145 Fed. Rep. 166 (C. C. A.).
(4) 3 Burr. 1637.
(5) (1879) 4 Q. B. D. 462, 465, 468.

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the date of arrival. *Tharsis Sulphur and Copper Co.* v. *Morel Brothers & Co.* (1) was decided on a different contract. This case does not fall within authorities on insurance, such as *Mercantile Steamship Co.* v. *Tyser* (2) and *Inman Steamship Co.* v. *Bischoff.* (3) If any period had been fixed in this clause it would have been from the date fixed for arrival, namely, December 15, 1907. The charterers elected to go on with the contract, so they were bound to load the ship: *Scarf* v. *Jardine.* (4)

Leslie Scott, K.C., and *W. Norman Raeburn*, for the defendants. The appellants' contention comes to this, that it would have been reasonable if the parties had made a different contract, and had inserted a provision that the option should be exercised within a reasonable time from the date fixed for arrival, wherever the ship might be. The Court will not imply a further term in a contract unless it is clear that the parties must have intended to insert such a term in order to give efficacy to the contract. It may be admitted that the law implies a reasonable time, but that does not touch the question from what date time shall be counted: *The Moorcock* (5); *Hamlyn & Co.* v. *Wood & Co.* (6) What time is reasonable depends upon the existing circumstances, assuming that those circumstances, in so far as they involve delay, are not caused by the person who asks for time: *Hick* v. *Raymond & Reid.* (7) It cannot be reasonable from the charterers' point of view that they should have to exercise their option before the arrival of the ship. The ship has to go to the loading port, so it is obvious that the terminus a quo time has to be counted must be the date of actual arrival. The American authorities are only a repetition of a well-known rule. The practice of construing cancellation clauses in charterparties in this way has been going on for many years and will not be altered now: *Tharsis Sulphur and Copper Co.* v. *Morel Brothers & Co.* (1); *Thorn* v. *Mayor, &c., of London.* (8) It is absurd to suppose that any charterer would bind himself to exercise his option at the time suggested by the appellants. Many reasons for this conclusion

(1) [1891] 2 Q. B. 647.
(2) (1881) 7 Q. B. D. 73.
(3) (1882) 7 App. Cas. 670.
(4) (1882) 7 App. Cas. 345.
(5) (1889) 14 P. D. 64.
(6) [1891] 2 Q. B. 488.
(7) [1893] A. C. 22.
(8) (1875) L. R. 10 Ex. 112.

are given in the judgment of Bray J., and his decision ought to be affirmed.

Horridge, K.C., in reply.

Cur. adv. vult.

1910. July 8. The following written judgments were delivered:—

COZENS-HARDY M.R. This appeal raises one point, said to be of general importance and not covered by any English authority, whether under an ordinary cancelling clause shipowners can require charterers to exercise their option before the ship arrives at the loading port. The plaintiffs are the owners of the sailing ship *Langdale*. The defendants are the charterers. By the charterparty dated March 18, 1907, it was provided that the ship should, with all convenient speed after discharge of cargo on the west coast of South America, sail and proceed to Newcastle, New South Wales, and there load a full cargo of coal which the charterers bound themselves to ship. And after the usual clauses excepting certain perils, and providing for freight at the rate of 23*s.* per ton, there was a cancelling clause in the following words: "The charterers, or their agents, have the option of cancelling this charterparty provided the ship is not arrived as within described at Newcastle, New South Wales, by the 15th December, 1907." The ship was delayed by bad weather, or other circumstances not due to any default on the part of the plaintiffs, and the charterers were asked, when it was manifest that the ship could not arrive before December 15, and again after that date had passed and the ship was still on the west coast of South America, to say whether they intended to cancel the charter. The charterers declined to say anything before the ship arrived. The ship did not arrive until June 15, 1908, on which day the charterers gave notice that they cancelled the charter. The shipowners sue the charterers for breach of contract in not loading her when she arrived, and assert that the option to cancel could only be exercised within a reasonable time after it was known that the ship could not arrive by the named date. The charterers rely upon the cancellation on June 15. Bray J. has given judgment

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in favour of the charterers, and in my opinion his decision was right. Under the charterparty the shipowners were bound to take their ship to Newcastle, however much behind time it might arrive. If it arrived before December 15 the charterers were bound to load. If it arrived after that date the charterers were not bound to load, though they had the right to load. Whether they should load or not would depend upon whether on the arrival of the ship freights had risen or fallen, and also upon whether they had a cargo ready. The cancelling clause is obviously inserted for the exclusive benefit of the charterers, and I fail to see how, as matter of business, the charterers can tell whether it will be to their interest to cancel before the arrival of the ship. I decline to hold that there is any implied condition that the option shall be exercised within a reasonable time after the cancelling date. This is in accordance with the view taken by the American Courts.

Bray J. so fully discusses the English and American authorities that it would be a waste of time for me to repeat what he said.

The appeal must be dismissed with costs.

FARWELL L.J. I am of opinion that on the true construction of this charterparty, taken as a whole, the parties have expressed, not indeed in so many words, but with reasonable clearness, the limits of time within which the power of cancellation is to be exercised by the charterers. The objective point of the contract is Newcastle, New South Wales: the ship is to sail and proceed there, and when she is there the charterers are to ship on her a full cargo of coal: the ship is consigned to the charterers' agents at Newcastle, New South Wales, and although she is not bound to arrive by any given date, so that the shipowners are not liable for breach of contract if she fails, yet non-arrival by December 15, 1907, is treated as default by the shipowners. Thereupon the charterers are entitled to cancel the contract, and this power of cancellation is given to the charterers or their agents, that is, their agents to whom she is consigned at Newcastle. The material circumstances which will guide the charterers in exercising their option to cancel or not

will obviously be the state of the markets, the rate of freights, and the like, when the ship arrives at Newcastle; and the charterers are entitled by the express words of the contract to exercise the option by their agents there, with whom such knowledge would lie. The mere arrival of December 15, while the ship is somewhere in mid ocean, may and probably will be immaterial: it is impossible to predicate on that day what the state of things in Newcastle will be on that unknown day in the future at which the ship will actually arrive there. I am therefore of opinion that the period during which the option is to be exercised extends from December 15 until twenty-four hours after the vessel has completed her discharge at Newcastle, being the period at which the lay days begin under the charter-party, and that Bray J. was right in the conclusion at which he arrived. It follows that, as this is the true construction of the contract, no question of reasonable time arises. If the contract were silent as to the period of time within which the option must be exercised, then I think it clear that there would be an implied term that the option should be exercised within a reasonable time—it cannot be exercisable only on December 15—and if so, this would be a question of fact for the jury. But I may add that it is difficult to see how a jury, if properly directed under ordinary circumstances such as the present, could fail to come to the same conclusion as to the reasonable time that I have found on construction. They would be directed that the charterers were entitled to a reasonable time in which to ascertain the relevant facts necessary to enable them to make up their minds; that they were not bound to consider the shipowners' interests, but their own only: see *Tharsis Sulphur and Copper Co.* v. *Morel Brothers & Co.* (1) and *Scarf* v. *Jardine* (2); and that the shipowners were bound to send the ship to Newcastle, unless the charterers elected not to require it: *Shubrick* v. *Salmond.* (3)

The appeal, therefore, fails and should be dismissed with costs.

KENNEDY L.J. I am of opinion that the considered judgment of my brother Bray J. in favour of the defendants ought to be

(1) [1891] 2 Q. B. 647, at p. 652. (2) 7 App. Cas. 345, at p. 360.
(3) 3 Burr. 1637.

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affirmed, and I have but little to add to the expression of my general concurrence in the reasons which he has given for his conclusion.

The contractual obligation of the shipowners, the plaintiffs in this action, is clear. They are bound to see that their ship, unless prevented by certain excepted causes and perils, proceeds to Newcastle, New South Wales, the named port of loading in Australia, and is there placed at the disposal of the charterers. The corresponding and correlative right of the shipowners is also clear. It is to have their ship loaded by the charterers after her arrival at the loading port as and with the cargo, and within the time fixed by the charterparty, subject always to a stipulated risk of defeasance, namely, that if the ship's arrival is delayed beyond an agreed date, the charterers' obligation to load thereupon ceases to be enforceable against them. In that event they may load or not load the ship as they please. I seek in vain for any words in the cancelling clause or elsewhere in the charterparty which entitle the shipowners to say that the charterers are not to have the full benefit of the undertaking of the shipowners that their ship shall proceed to the port of loading because she fails to get there at the named date. But the charterers cannot get the full benefit if they are called upon to decide at any moment before the ship is at their disposal at the loading port. The contractual duty of the shipowners to proceed to the port of loading does not cease because, before the ship arrives there, the day comes after which, if the ship has not arrived, the charterers' contractual duty to load her when she does arrive is converted, by the special clause of the charterparty, into a matter of their free choice. In fact, the plaintiffs in this case, at one stage, attempted to take up this position, but under good advice abandoned it; and their counsel, on the hearing of the appeal before us, expressly disclaimed any such contention. But they do contend that if, after the date named in the cancelling clause has arrived, but the ship has not, the charterers decline within some period which they describe as "a reasonable time" to answer any inquiry whether, when the ship arrives, the charterers will load her or not, the charterers become bound, whenever she arrives, to load her under the

charterparty, and to pay, of course, the chartered freight. I agree with Bray J. that from the mercantile point of view so vague a stipulation as that of "a reasonable time" under which in some way the conflicting interests of shipowner and charterer are to be harmonized, and under which the charterer, as indeed is the present case, would be asked to anticipate, days, or weeks, or possibly months ahead, what his interests might be when the ship arrives, would certainly be deemed unpractical and unbusinesslike. But what we have to consider is the proper legal meaning of this contract; and I can see no justification from this standpoint for reading into this contract a limitation of the exercise of the charterers' option such as counsel for the plaintiffs have argued for. It seems to me that the cancelling clause, read as it must be with the rest of the contract of which it only forms part, itself supplies the period within which the charterers' choice must be exercised, namely, the named date as the commencement, and, as the termination, the date after the ship's arrival at which the shipowner's right to require the charterers to load her commences under the provisions of the charterparty as to her loading. If I am right in this view, there is no room for an implication of a duty on the charterers' part to exercise their right of option within "a reasonable time" (whatever that might be construed to mean) after the date has been reached which ends the absolute right of the shipowners to have their ship loaded when she arrives at Newcastle. The law reads into a contract "a reasonable time" for an act—be it for giving of a notice, or doing a work, or paying money, or exercising an option—where the intention of the parties to a contract which has no fixed time, either expressly or by just implication, must be presumed to have included such an implication. There is no room for it otherwise. And here, as I have already pointed out, the contract itself giving the charterers the right to have the ship proceed to Newcastle, and also the right, if she does not arrive by a certain day, to refuse to load her, and fixing the time after her arrival when, unless the charterers decide not to load at all, they must begin to load, has itself given the range of time within which the charterers may exercise their option. The only judicial authorities extant upon the exact point raised by these

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plaintiffs—the American decisions—are entirely in accord with my view. Counsel for the plaintiffs seemed to invoke the aid of certain dicta in the judgment of Lush J. (the dissentient judge) in *Adamson* v. *Newcastle Steamship Freight Insurance Association*.(1) That judgment proceeded upon the view, which Cockburn C.J. and Manisty J. rejected, that according to the true construction of that charterparty the contract did not terminate upon the happening of a certain event, but that each of the parties, charterer and shipowner, had an option on the happening of that event to cancel the charterparty, and, in the passage referred to, Lush J. was evidently pointing out that, in these circumstances, if either of them sought to take advantage of the option he ought to say so within a reasonable time after the right arose, because otherwise he would very likely mislead the other party, who also had a right of option under the same clause, and might be induced by his silence to incur expenses and difficulties. Under that charterparty each of the two contracting parties had rights of cancellation, the exercise of which had to be adjusted. The charterers in the present case have not to consider any corresponding right of the shipowners, for the shipowners have no right of cancellation and are bound to see that their ship proceeds to the loading port. The dicta referred to appear to me to have no application to the very different relations created by the particular contract in the present case.

Appeal dismissed.

Solicitors: *Walker, Son & Field, for Weightman, Pedder & Co., Liverpool; William A. Crump & Son.*

(1) 4 Q. B. D. 462, at p. 468.

H. C. R.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D. 1910 *June* 17.
C. A. 1910 *July* 18, 19, 20, 28.

THE KING *v.* THE ASSESSMENT COMMITTEE OF THE METROPOLITAN BOROUGH OF SHOREDITCH.

Ex parte MORGAN.

Poor Rate—Metropolis—Public-house—Quinquennial Valuation—Provisional List—Reduction of Value—Increased Licence Duty—"Any Cause"—Mandamus to Assessment Committee to appoint Valuer — Valuation (Metropolis) Act, 1869 (32 & 33 *Vict. c.* 67), *s.* 47—*Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 43, 44; *Sched. I., C.*

The heavy increase in the duty imposed by the Finance (1909-10) Act, 1910, upon licensed premises in the metropolis—

Held to be prima facie evidence of a reduction in value within s. 47 of the Valuation (Metropolis) Act, 1869, so as to entitle the tenant, if default is made by the overseers in sending a provisional list to the assessment committee pursuant to sub-s. 1, to require the assessment committee to appoint a person to make such a list pursuant to sub-s. 2 of that section.

Order Nisi to the assessment committee of the metropolitan borough of Shoreditch to shew cause why a writ of mandamus should not issue commanding them "to appoint a person to make a provisional list for the parish of Shoreditch in the said borough containing the gross and rateable value of the Crown and Shuttle public-house, ... whereof one Harry Nicholls Morgan is the occupier and lessee, as reduced since the making of the valuation list now in force as required by the Valuation (Metropolis) Act, 1869, s. 47, sub-s. 2, on the ground that the said values have been reduced in the course of the year beginning the 6th day of April, 1910, within the meaning of the said section of the said Act."

The above-named Crown and Shuttle public-house was a tied house, of which Morgan had been the occupier and lessee since 1896.

At the quinquennial valuation in 1905 the gross annual value as assessed for poor rate of this house was 260*l.*, and the licence duty payable by Morgan until the coming into operation of the Finance (1909–10) Act, 1910, was 35*l.*

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By the Finance (1909–10) Act, 1910, s. 43, Sched. I., C, the licence duty was raised to half the annual value of the licensed premises and would therefore amount in this case to 130*l.* instead of 35*l.*, an increase of 95*l.* This increased duty came into operation on July 1, 1910.

On May 11, 1910, Morgan sent a written requisition under s. 47 of the Valuation (Metropolis) Act, 1869 (1), to the overseers for a provisional list on the ground that the value of the public-house had been reduced by reason of the increased licence duty. The overseers did not send a provisional list to the assessment committee as required, and the matter eventually came before the assessment committee on default of the overseers to comply with the requisition, and the assessment committee, after consideration and after hearing Morgan's representative, passed a resolution on June 7 that they found as a question of fact that the premises had not been reduced in value during the year so as to warrant the committee appointing a person to make a provisional list therefor.

Morgan thereupon obtained the above-mentioned order nisi, which came on for argument before the Divisional Court on June 17.

June 17. *C. A. Russell, K.C.*, and *Avory, K.C.* (*Courthope-Munroe* with them), for the assessment committee, shewed cause.

(1) Sect. 47 of the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), is as follows: "If in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value, the following provisions shall have effect:—

"(1.) The overseers of the parish in which such hereditament is situate may, and on the written requisition of the assessment committee or of any ratepayer of the union or of the surveyor of taxes for the district shall, send to the assessment committee a provisional list containing the gross and rateable value as so increased or reduced of such hereditament;

(2.) A copy of the requisition shall be sent by the person making it to the clerk of the assessment committee, and if within fourteen days after the requisition has been served on the overseers they make default in sending such provisional list, he shall forthwith summon the assessment committee, and the assessment committee shall appoint a person to make such provisional list, in the same manner as is in this Act provided in the case of the overseers failing to transmit a valuation list."

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Ryde (*Danckwerts*, *K.C.*, with him), in support of the rule. (1)

LORD ALVERSTONE C.J., after stating the facts, continued:— The question raised is an important one, but, in consequence of the recent decision of this Court and of the Court of Appeal in *Rex* v. *Southwark Assessment Committee* (2), there is not, in my opinion, any real difficulty in deciding this case. In dealing with s. 47 of the Valuation (Metropolis) Act, 1869, one must confine oneself to the particular case or class of case, and I do not wish to be understood as laying down a rule applicable to all cases. I say so because the mere alteration of some charge which falls upon the tenant of a rateable hereditament would not, in my opinion, in itself of necessity make out a case in which a provisional list ought to be made. In order to bring the section into operation a prima facie case of an increase or reduction in value from some cause specified in the section must be made out.

When the facts of this case are considered it seems to me that a prima facie case of reduction in value is made out. The licence duty has been raised from 35*l.* to 130*l.*, and that charge will prima facie fall upon the tenant. Sect. 46 of the Finance (1909–10) Act, 1910, which has been called the tied house section, seems to imply that under ordinary circumstances the duty falls upon the tenant. That is only one indication that it falls upon the tenant. The term "gross value" is defined in s. 4 of the Valuation (Metropolis) Act, 1869, as meaning "the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament, if the tenant undertook to pay all usual tenant's rates and taxes, and tithe commutation rent-charge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command the rent." I am not at all sure that the licence duty can be called a "usual tenant's rate or tax," and so I do not base my judgment upon that. The

(1) It is not thought necessary to give the arguments here, as they are fully set out on the appeal.

(2) [1909] 1 K. B. 274.

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amount, however, of the licence duty is clearly a most material element in ascertaining the annual rent which a tenant would give for the premises. We should be shutting our eyes to the natural conclusion to be drawn from the facts if we were to assume that a tenant, in estimating the annual rent which he would pay for the premises, would not take into consideration that he had to pay an annual charge of 130*l.* as distinguished from an annual charge of 35*l.* Therefore it seems to me, without entering into the conflicting opinions as to value expressed in the affidavits, which have not affected my mind, and without which we could have drawn our own conclusion quite as well, that the facts shew a prima facie reduction in the annual value of the premises, though it may be that when the matter is investigated by the valuer to be appointed under the section it will be found that the value of the hereditament has not been reduced either by reason of the price of beer charged to the publican being reduced or the price of beer charged by the publican being increased, or from some other cause.

The next question is whether the assessment committee are to be the judges of this matter. The assessment committee in giving their decision on June 7, say this: "The assessment committee after consideration found as a fact that none of these premises"—the premises include the Crown and Shuttle—"have been reduced in value during the year so as to warrant the committee appointing a person to make a provisional list therefor." The assessment committee did not fall into the error, which we thought they fell into in *Rex* v. *Southwark Assessment Committee* (1), of declining to appoint a valuer upon the ground that the case did not come within s. 47. The assessment committee have considered it on the materials before them and have come to the conclusion that there is no reduction in the value of the premises. The question is whether they are made the sole judges of that. The effect of the argument in this case is to strengthen in my mind the opinion which I formed in *Rex* v. *Southwark Assessment Committee* (1) that the assessment committee are not to be the final judges of that, and certainly not the judges in

(1 [1909] 1 K. B. 274.

the same way as the person who is under the section to make the provisional list, and who has to inform his mind as to what the value is. The assessment committee are bound to act in every case; there must be something which, as I said in *Rex* v. *Southwark Assessment Committee* (1), shews a prima facie case of a reduction in value of the rateable hereditament, and this expression was approved by Kennedy L.J. in the Court of Appeal. (2) The facts which I have stated establish, in my opinion, a prima facie case of reduction in value in this case. Whether or not the ultimate consideration of the circumstances will shew that the premises have or have not been reduced in value, it seems to me to be impossible to say that the imposition of an extra burden of 95*l.* a year is not a matter which will prima facie reduce the annual value of the premises. In these circumstances it seems to me that the matter ought not to have been stopped by the assessment committee, and that therefore this order should be made absolute.

This case illustrates once more the importance of the considerations which arise under sub-s. 10 of s. 47. I pointed out in *Rex* v. *Southwark Assessment Committee* (1), and my brother Walton emphasized it even more strongly (3), that, unless in a proper case a provisional list is made, the ratepayer may be deprived of the remedy which the section intended to give him. It is not disputed that, unless a provisional list is made, the ratepayer must go on paying rates upon the existing rateable value, and it is only if a provisional list is made, and the next supplemental list as settled on appeal shews that he has been too highly rated therein, that the ratepayer is able to claim back the amount which he has overpaid as from the date when the provisional list came into operation. That consideration seems to me to support the view that, if a prima facie case of a reduction in value of the hereditament is shewn, it is not intended that the assessment committee should upon some materials before them decide this question of fact. It was suggested that a difficulty might occur in working out the matter

(1) [1909] 1 K. B. at pp. 288, 289. (2) Ibid. at pp. 308, 309.
(3) Ibid. at p. 293.

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where the question arises in the last year of the quinquennial period. I do not know that any such difficulty will arise. But, if a case is made out for asking for relief under s. 47, in my opinion any such consideration ought not to affect our decision.

An argument has been based upon s. 44 of the Finance (1909–10) Act, 1910. It seems to me that, if that section has any bearing at all upon the question, it is against the contention urged on behalf of the assessment committee. Sect. 44 provides that "(1.) the annual value of any premises for the purposes of any duty charged in the First Schedule to this Act"—those duties include the public-house licence duty—"shall be determined in the same manner and subject to the same conditions (including, as respects licensed premises in Ireland, the provisions of sub-section 7 of section 43 of the Inland Revenue Act, 1880) as the annual value of premises is determined for the purpose of a publican's licence, and, in the determination of that value, the duty on the licence is not to be allowed as a deduction." It may be that the effect of that provision is that, notwithstanding that the gross and rateable values may be reduced for the purpose of the poor rate and other rates based upon the valuation list, they will not be reduced for the purpose of the licence duty under this section. It was pointed out to us by counsel who appeared on behalf of the Commissioners of Customs and Excise (1) that they had an interest in the matter, and that question may have to be determined some day. But we cannot allow it to affect our decision in the present case. I express no opinion as to what is the annual value upon which the licence duty is to be assessed. I only decide that for the purpose of the poor rate and the other rates which are based upon the valuation list made under the Valuation (Metropolis) Act, 1869, there is made to appear for the year ending April 5, 1911, upon the affidavits before the

(1) When the case was called on, *F. F. Daldy* appeared on behalf of the Commissioners of Customs and Excise, who had not been served with notice of the rule, and applied to be heard in the event of the question being raised whether or not the provisional list was conclusive of the annual value of the premises for the purpose of assessing the amount of the excise licence duty. The Court, however, did not find it necessary to hear him.

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Court, and there was made to appear before the assessment committee, a state of circumstances which shew a prima facie case of reduction in the annual value and therefore the rateable value of the premises. Acting upon what was said in *Rex* v. *Southwark Assessment Committee* (1), in my opinion it was not intended that the assessment committee should be the judges of the matter. It was not intended that by their decision in a matter in which they are to a certain extent interested the ratepayer should be deprived of some of his rights, and, as I have already said, I think that the benefit which the ratepayer is entitled to under sub-s. 10 of s. 47 of the Act of 1869 should be preserved to him, assuming it to be the fact that the annual value of the hereditament is reduced. The order must be made absolute.

GRANTHAM J. I agree with what has fallen from my Lord, and I have very little to add. By s. 47 of the Valuation (Metropolis) Act, 1869, if in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value, a provisional list shall be made. The assessment committee have to consider whether a prima facie case has been made out of a reduction in value of the hereditament. In my opinion a prima facie case has been made out here. The licence duty payable by the tenant has been increased by the Finance (1909–10) Act, 1910, from a sum nearly equal to one-eighth of the annual value to a sum equal to about one-half of the annual value. Every prudent person, in estimating the rent which he will pay for a house he is proposing to take, calculates the amount of the rates and outgoings payable in respect of that house. If he knows that by some recent Act the rates payable in respect of the house have been increased by a considerable sum, he will not agree to pay the same rent as if the rates had remained at their old figure. Therefore this great increase in the licence duty is a cause which has prima facie reduced the rental value and therefore the annual value of this house. In so deciding we are not prejudging the ultimate decision as to the annual value of this house, nor are we precluding the assessment committee from

(1) [1909] 1 K. B. 274.

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saying upon evidence properly brought before them that from some cause not known to us there has been no reduction in the annual value of this house. What may be proved then is not a matter by which we can in any way be guided now. For these reasons I think that the order for a mandamus must be made absolute.

CHANNELL J. I am of the same opinion. There is one point in this case about which I have not been altogether free from doubt, and therefore I should like to explain my views upon it. Sect. 47 has not been an easy section to construe, but there have been a number of decisions upon it, and its construction seems now to be fairly well settled. I think that perhaps the clearest explanation of the section appears in the judgment of Lord Davey in the House of Lords in *Camberwell Assessment Committee* v. *Ellis.* (1) That case was considered in *Rex* v. *Southwark Assessment Committee* (2), and Vaughan Williams L.J. (3) referred to the judgment of Lord Davey as putting in a clear and concise manner the view which the House of Lords took of the section. Lord Davey, after quoting s. 47, which provides that "if in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value," then certain provisions specified in the section are to apply, said (4) that he agreed that those words could not be confined to structural alteration or addition or anything of that kind, and went on: "But I think that the words 'from any cause' are to be read as ejusdem generis in this sense—that it must be a cause which affects the value of the particular property." Applying that test, it seems to me that, where the particular property is a property which is assessed by reason of its being applied to a particular purpose, such as a particular trade, and has a special value put upon it for that reason, then anything which affects the profits or takings of that trade must be an element to be taken into consideration in arriving at the annual value of the property.

(1) [1900] A. C. 510.
(2) [1909] 1 K. B. 274.
(3) Ibid. at p. 299.
(4) [1900] A. C. at p. 523.

Inasmuch, therefore, as licensed houses are undoubtedly valued at an increased value beyond that which they would have if no licence were attached to them and if they were occupied as private dwelling-houses only or as shops or banks, and not for the purpose of carrying on the particular trade of a licensed victualler, it is impossible to say that the amount of the licence duty which the tenant has to pay for permission to carry on that particular trade on the premises is not an element to be taken into consideration in ascertaining the annual value of the premises. It seems to me to be quite clear that it must be an element in ascertaining the value. That being so, does the mere fact that there has been a very large and substantial increase in the amount of the licence duty shew a prima facie case of a reduction in the value of the premises? It is upon this point that I have had some little doubt. In *Rex* v. *Southwark Assessment Committee* (1) it was alleged that the rateable value of the South-Eastern and Chatham Railway lines was reduced in value by reason of the competition of tramways, tube railways, and motor omnibuses. It seems to me that the mere fact that tramways or tube railways had been built and opened for traffic and lines of motor omnibuses established would not of itself have been held to be sufficient to shew a reason for making a provisional or a supplemental list; there was in that case distinct evidence that the receipts of the railway had in fact been reduced. I have had some doubt whether it could be said that the mere fact that one element of value was substantially altered was in itself a sufficient ground for holding that a prima facie case of reduction in value of the hereditament had been made out, or whether it was not necessary to go further and to give evidence to the effect that the substantial alteration of that one element of value had in fact had that effect, just as in the case of the competition of tramways or tube railways it was necessary to shew that the receipts of the railway company had been reduced by the competition. But I am not inclined to differ upon this point, because, as pointed out by my Lord, this is a very substantial alteration in the licence duty, and it is a matter which prima

(1) [1909] 1 K. B. 274.

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facie must affect the amount of the profits from the business done in the house, and therefore the value of the house; and although it may be that new arrangements may be made in the trade by which either the wholesale price of beer to the publican may be diminished or the retail price of beer as sold by the publican may be increased, so that the profits may be the same notwithstanding that there is this increase of the licence duty, although that may in point of fact happen, still I think that on the whole we are justified, having regard to the amount of the increase, in saying that a prima facie case has been made out. If that is so, the rest of the case is clear. I entirely agree with my Lord that it is not enough for the assessment committee to say that there has been no reduction in value, because the very object of the Legislature is to have a valuer appointed who shall inquire into the matter and see whether the value has or has not been reduced. I think, therefore, that a prima facie case has been made out.

It is hardly necessary to point out that our decision does not apply to increases of all duties. The case was put in the course of the argument of an increase being made in the tobacco duty, and thereby the profits of the tobacconist being diminished. The reasoning of the present case would not apply to such a case as that. As was pointed out by Lord Davey in *Camberwell Assessment Committee* v. *Ellis* (1), "it is not sufficient to say that there has been an alteration in value, but you must also point to some definable cause to which that alteration is due, and that cause must be one which affects the assessable value of the particular property." A tobacconist's shop is not valued by reason of the business that is carried on there; it is valued on other considerations altogether. It is only because licensed houses are undoubtedly valued upon the footing that the particular trade of a licensed victualler is carried on there that it seems to me that this is a case which comes within the section. I agree that this order should be made absolute.

Order absolute

W. F. B.

(1) [1900] A. C. at p. 523.

The assessment committee appealed. The appeal was heard on July 18, 19, and 20.

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C. A. Russell, K.C., *Horace Avory, K.C.*, and *Courthope-Munroe*, for the appellants. The introductory words of s. 47 of the Valuation (Metropolis) Act, 1869, shew that, unless an alteration in value has taken place, sub-ss. 1 and 2 have no operation, and beyond the bare fact that the Finance (1909-10) Act, 1910, has been passed, which imposes an increased licence duty, nothing has happened to cause any alteration in value, and there is no evidence of any reduction. The overseers are not bound to comply with the requisition if they are of opinion that no alteration in value has taken place, and a mandamus will not be granted to compel them to do so: *Reg.* v. *Overseers of St. Mary, Bermondsey.* (1) It is only if a prima facie case of alteration in value is made out that, upon default of the overseers, the assessment committee are to appoint a person to make a provisional list: *Reg.* v. *Assessment Committee of St. Mary, Islington* (2); *Rex* v. *Hammersmith Assessment Committee.* (3)

In *Rex* v. *Southwark Assessment Committee* (4) specific evidence was given of a reduction in the takings of the railway company in consequence of the competition from tube railways and other means of locomotion; the fact of a reduction in value was not put forward as a question of surmise as in the present case. The alleged alteration in value is of a different character from the alteration in *Reg.* v. *New River Co.* (5) and *Reg.* v. *Poplar Union Assessment Committee.* (6) In *Camberwell Assessment Committee* v. *Ellis* (7) a mere general rise in the annual value of the class of property to which the particular hereditament belonged was held not sufficient evidence of alteration. The onus is on the person making the requisition to shew that an alteration in value has happened. There is no evidence to raise even a prima facie "cause" such as the section requires. What the landlord has to offer is just the same now as in 1905 and is not in any way altered in value; there is nothing to shew

(1) (1884) 14 Q. B. D. 351.
(2) (1887) 19 Q. B. D. 529.
(3) (1909) 73 J. P. 433.
(4) [1909] 1 K. B. 274.
(5) (1879) 4 Q. B. D. 309.
(6) (1884) 13 Q. B. D. 364.
(7) [1900] A. C. 510.

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that the character of the neighbourhood is altered or that this public-house is not doing the same amount of trade. The cases already cited shew that it is not every alteration that comes within s. 47. In the valuation of licensed premises the licence duty is by s. 44, sub-s. 1, of the Finance (1909–10) Act, 1910, not to be allowed as a deduction. The licence duty is personal to the tenant; if he wishes to sell intoxicating liquor he must have one. An increase in this duty may increase the price of the article sold, but it does not affect the rent of the public-house; it is not one of the tenant's rates and taxes, any more than an increase in the tobacco duty would affect the rent of a tobacconist's shop. This extra charge of 95*l.* per annum, though a charge upon or deduction from the profits of the tenant's trade, is not a matter which can be taken into account in considering the "gross value" as defined by s. 4 of the Metropolis (Valuation) Act, 1869, when considering the rent which the tenant may reasonably be expected to pay: *Waddle* v. *Sunderland Union.* (1) It is not impossible that a reduction in the value of the house may follow as a consequence of the increased licence duty, but there is no evidence of this at present; the "cause" mentioned in s. 47 must be one that directly affects the assessable value of the particular hereditament and must be a cause somewhat analogous to a structural alteration of or addition to the premises: *Camberwell Assessment Committee* v. *Ellis.* (2) It is not enough to make out a mere case for inquiry, there must be some prima facie evidence of reduction. The alteration of one element in value is not sufficient. The Divisional Court did not consider the question that the tenant of a public-house may have to suffer a reduction of his profits.

Where an inferior tribunal has to exercise a discretion, and exercises that discretion honestly, the High Court will not interfere by mandamus. The High Court will not direct the particular way in which a particular duty is to be performed by an inferior tribunal; it only directs the duty to be performed. The assessment committee, having arrived at the conclusion, as a fact, that the alleged reduction of value has not been shewn to their satisfaction, cannot be interfered with; they are entitled to

(1) [1908] 1 K. B. 642. (2) [1900] A. C. 510.

come to that conclusion as the authority appointed by statute to deal with the question of fact. This point is expressly dealt with by Bigham J. and Kennedy L.J. in *Rex* v. *Southwark Assessment Committee.* (1) They have merely arrived at a conclusion of fact and not at a wrong conclusion of law. A mere ex parte statement is not prima facie evidence of reduction and is not sufficient to establish the fact alleged by the applicant to the assessment committee. If it is the duty of the authority to put the house into a provisional list at a reduced value, how can the valuer exercise any discretion? The respondent cannot succeed unless the Court can say as a question of fact that there has been a reduction in value owing to the passing of the Finance (1909–10) Act, 1910, and this the Court cannot do without usurping the functions of the assessment committee. The Court cannot hold as a matter of law that liability to pay this increased licence duty has reduced the value of this particular hereditament. The Legislature deals with the case of individual hereditaments the value of which happens to have been altered, not by general economic or social change, but by change in their own individual conditions affecting value: *Camberwell Assessment Committee* v. *Ellis.* (2)

Danckwerts, K.C., and *Ryde*, for the respondent. An alteration in value has taken place in this house since April last by the coming into operation of the Finance (1909–10) Act, 1910, which increases the licence duty payable by the tenant. It is a "cause" which affects this house in particular, and none the less so because it affects other public-houses as well. Unless the tenant pays for this licence he cannot carry on his trade; without this licence this house is useless to him.

Licensed premises command a higher rent by reason of the licence, and this extra expense entailed on the tenant cannot be excluded; he cannot go elsewhere, he must carry on his trade in a particular house: *Reg.* v. *London and North Western Ry. Co.* (3) Licensed premises are always valued on the footing that they enable the tenant to carry on this particular trade, and if a licensed house is assessed at a higher sum than houses of

(1) [1909] 1 K. B. at pp. 292 and 308. (2) [1900] A. C. at p. 525.
(3) (1874) L. R. 9 Q. B. 134, 144.

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the same size in the same street because it enables the tenant to carry on this particular trade, that is a matter to be taken into account, and the fact that 130*l.* is now payable for a licence instead of 35*l.* must affect the rent and so the value of this house. Morgan took this house on the footing that he would have to pay the rent then demanded plus a licence duty of 35*l.* before he could make any profits; now he has to pay 130*l.* for the same licence to enable him to make a profit, and this must affect the rent.

In the case of licensed premises regard may be had to profits made by means of the licence: *Cartwright* v. *Sculcoates Union.* (1) Sect. 44, sub-s. 1, of the Finance (1909–10) Act, 1910, seems to imply this. The "tied" house and the "free" house are valued in the same way: *Sunderland Overseers* v. *Sunderland Union* (2); *Parr* v. *Leigh Union.* (3) A large increase in the licence duty is therefore prima facie evidence of a reduction in rental value, and therefore of rateable value. *Reg.* v. *Overseers of St. Mary, Bermondsey* (4) is not an authority against this contention.

In *Reg.* v. *New River Co.* (5) an increase in the growth of population was held to justify the insertion in a provisional list of the pipes and mains of a water company, and in *Reg.* v. *Poplar Union Assessment Committee* (6) the falling off in tonnage rates was held sufficient cause; and *Reg.* v. *Assessment Committee of St. Mary, Islington* (7) is exactly in point, the question there being one of making a prima facie case. Some of the above are cases of supplemental lists, but in *Camberwell Assessment Committee* v. *Ellis* (8) it was held that the alteration dealt with in s. 46 (supplemental lists) and s. 47 (provisional lists) was of the same character. In *Rex* v. *Southwark Assessment Committee* (9) the same attitude was adopted by the assessment committee as is adopted in the present case, but unsuccessfully, and that case seems to cover the present case.

As to the form of the mandamus, there is no objection to its being left open whether in fact there has been a reduction or not.

(1) [1900] A. C. 150.
(2) (1865) 34 L. J. (M.C.) 121.
(3) (1905) 1 Konstam's Rating Cases, 211.
(4) 14 Q. B. D. 351.
(5) 4 Q. B. D. 309.
(6) 13 Q. B. D. 364.
(7) 19 Q. B. D. 529.
(8) [1900] A. C. 510.
(9) [1909] 1 K. B. 274.

The overseers cannot defeat an aggrieved ratepayer by omitting to send a provisional list within fourteen days, and if the requisition states a prima facie case the assessment committee are bound to appoint a valuer; if they refuse, a mandamus could be granted. Sect. 47 of the Valuation (Metropolis) Act has no provisions corresponding to s. 46, sub-ss. 3 and 4, but the assessment committee by wrongly deciding a question of fact cannot give themselves jurisdiction—*Rex* v. *Bradford* (1)—or by means of an erroneous finding exclude the granting of a mandamus—*Liverpool Gas Co.* v. *Everton* (2)—so that this Court can review the finding of the assessment committee whether it be a finding of fact or law. If the assessment committee decided that there was no "cause" shewn the Court would refuse a mandamus if the applicant really had no case, but it has a right to review the evidence upon which the committee refused.

[KENNEDY L.J. Do you know of any case where there has been no actual loss shewn and a provisional or supplemental list has been granted?]

None nearer than *Camberwell Assessment Committee* v. *Ellis.* (3) In most of the cases the pecuniary loss has been manifest.

The case only requires to be stated to shew the certain loss of profits and therefore of rent that can profitably be paid. [*Commissioners for Special Purposes of Income Tax* v. *Pemsel* (4) was also cited.] Sect. 44, sub-s. 2, and s. 87 of the Finance (1909–10) Act, 1910, are rather in favour of the respondent.

Avory, K.C., in reply. The assessment committee have a discretion in this matter; they are not bound as a matter of law to appoint a person to make a provisional list. If the assessment committee have some discretion before appointing a person no mandamus ought to be granted. Sect. 47 cannot mean that the assessment committee are merely to perform a ministerial duty in appointing a person; they must direct him to make a list shewing an increase or a reduction in value, and they must in the first instance direct whether there is "any cause" for such alleged alteration in value, and before giving any direction

(1) [1908] 1 K. B. 365.
(2) (1871) L. R. 6 C. P. 414.
(3) [1900] A. C. 510.
(4) [1891] A. C. 531.

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they must inquire into the facts and exercise their judgment whether there is an alteration or not. If the assessment committee have considered the matter as simply one of fact and found that there has been no reduction in value, as they have done, this order should be discharged: *Rex* v. *Southwark Assessment Committee.* (1) *Liverpool Gas Co.* v. *Everton* (2) is distinguishable. There the recorder took upon himself to add something to the statute which he misconstrued. In the present case the Court is being asked to overrule the finding of the assessment committee on a question of fact.

Cur. adv. vult.

July 28. COZENS-HARDY M.R. This appeal raises an important and difficult question as to the effect of the Finance (1909-10) Act, 1910, upon the rating of licensed public-houses in the metropolis. The Crown and Shuttle is a public-house in Shoreditch. Morgan is the occupier and lessee of the house, and has been so since 1896. It is a tied house. At the quinquennial valuation in 1905 the gross annual value as assessed for poor rate was 260*l.* The licence duty payable by Morgan was, until the Finance (1909-10) Act, 1910, came into operation, 35*l.*, but under the Finance (1909-10) Act, 1910, the duty is equal to half the annual value of the licensed premises, that is to say, 130*l.*—an increase of 95*l.* a year. In these circumstances Morgan applied under s. 47 of the Valuation (Metropolis) Act, 1869, for a "provisional list" on the ground that the value of the licensed house had been reduced by reason of this increased duty. The overseers did not send a provisional list to the assessment committee, as requested by the requisition, within fourteen days, and the assessment committee, after consideration and after hearing Morgan's representative, passed a resolution that they found as a question of fact that the premises had not been reduced in value during the year so as to warrant the committee appointing a person to make a provisional list therefor. Thereupon Morgan applied to the Divisional Court for a mandamus, which was granted, and the assessment committee now appeal from the order of the Divisional Court.

(1) [1909] 1 K. B. at p. 292. (2) L. R. 6 C. P. 414.

In support of the appeal it has been argued (1.) that the introductory words of s. 47 shew that the subsequent parts of the section have no operation unless and until it has been established to the satisfaction of the assessment committee that the value has in fact been reduced, and that this has not been established; (2.) that the overseers and the assessment committee have a discretion of a judicial nature, and that this discretion has been honestly exercised and cannot be overridden by a mandamus, there being no mistake in law, and the mistake, if any, being in fact only; (3.) that there is no evidence to raise even a prima facie case of any "cause" such as the section requires, the increased duty being probably thrown upon the brewer, who will reduce his charges for beer supplied; and (4.) that the extra 95*l.* a year, though a charge upon or a deduction from the profits of the trade of the publican, is not a matter which can be taken into account in considering the "gross value," as defined in s. 4, which the hypothetical tenant might reasonably be expected to pay. Each of these points deserves attention. As to the first point, it seems to me to make nonsense of the whole section. The ascertainment of the fact of reduction cannot be a condition precedent to the putting in force of the machinery by which it may be ascertained whether in truth there has been any reduction in value. If the overseers do nothing for fourteen days, the assessment committee have no authority at that stage to ascertain the fact of reduction. They can only appoint a person to make a provisional list. Their jurisdiction does not arise until after notice of objection has been served, when authority is given to them to hear and determine the objection and to make such order as they think just: sub-s. 6. As to the second point, it is plain that the overseers cannot defeat an aggrieved ratepayer by omitting to send a provisional list within fourteen days, and it is equally plain that his remedy is to go to the assessment committee. The language of sub-s. 1 is "may," but the language of sub-s. 2 is "shall." The difference is important.

In my opinion, the assessment committee have not a discretion if the requisition states a prima facie case. If it does not state a "cause" from which the value has been reduced, they are not bound to appoint a person. If it states a "cause" which they

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think insufficient, having regard to the decisions, and they refuse to act, then, if the Court of King's Bench agrees with them, no mandamus will be issued. If, however, the Court does not agree with them, a mandamus ought to be issued. Moreover, I do not assent to the view that there was no mistake in law in the present case, for reasons stated below. As to the third point, I cannot doubt that the increased duty of 95*l.* must prima facie affect the gross value of the licensed premises: res ipsa loquitur. It is a sum the payment of which is essential to the carrying on of the business of a publican. It may well be that the whole sum will not ultimately fall upon the publican, but at first at all events it must be borne by him. It will be for the valuer when appointed to consider, not what is the correct value, but what reduction, if any, has taken place by reason of this "cause," starting from the assumption that 260*l.* was the proper sum apart from this charge. This in substance is the ground upon which Channell J. bases his judgment. The Finance Act received the Royal assent on April 29. The increased licence duty was not payable until July 1. No evidence derived from actual experience can be available in so short a period, and it would, in my opinion, be wrong to decline to have regard to the strong—I might almost say the overwhelming—prima facie case because of the impossibility of obtaining corroboration, and this consideration becomes more weighty when it is remembered that if Morgan were to wait for more than twelve months he could not avail himself under s. 47 of the reduction in value caused by the Finance Act, for it would not have happened in the course of the year. As to the fourth point, I have already partly dealt with it. The case of *Cartwright* v. *Sculcoates Union* (1) in the House of Lords decides that takings and profits of a licensed house may be taken into account in arriving at gross value. The hypothetical tenant would certainly be less willing to pay the old rent if he knew that an inevitable—not an optional—deduction of 95*l.* a year from the profits would in future have to be made. The licence is not like a gun licence or a dog licence. Though granted to an individual, it is only granted to him as occupier of this particular house. It is the

(1) [1900] A. C. 150.

possession of the licence which gives an increased value to the occupation of the house, and anything which makes that licence more costly must tend to diminish that increased value.

It was contended by the respondent that this licence duty is a tax usually payable by tenants of a public-house within the meaning of s. 4. Though I do not wholly reject this contention, I prefer to rely upon the ground above stated.

As already stated, I think the action of the assessment committee involved a mistake in law. There was no special circumstance affecting the Crown and Shuttle as distinguished from any other licensed house. The Finance Act was indisputable. The proper inference from the unquestioned facts is really a matter of law. Put shortly, the proposition upon which the assessment committee have acted is this: "The admitted sudden increase of licence duty from 35*l.* to 130*l.* is not even prima facie evidence of reduction in value of the licensed house so as to justify us in appointing a valuer to ascertain whether in fact there has been any, and if any what, reduction." This proposition seems to me to be wrong in law. It is not a case in which there is evidence on both sides, the weight of which would have to be considered. In the above observations I have dealt with the case apart from authority. I am not aware of any authority which precludes me from acting upon the view I have formed. In the language of Channell J., when once I am satisfied that a prima facie case has been made out, "all the rest seems to me to follow." The case of *Rex* v. *Southwark Assessment Committee* (1) in this Court is an authority in support of my view. If I had arrived at the conclusion that the mistake of the assessment committee did not involve a mistake in law, I might have been obliged to consider how far the dicta of Bigham J. and Kennedy L.J. in *Rex* v. *Southwark Assessment Committee* (1) ought to be followed, but I am relieved from that necessity. In my opinion the decision of the Divisional Court was right, and this appeal must be dismissed with costs.

FARWELL L.J. I am of opinion that the order of the Divisional Court is correct, and that the mandamus should issue.

(1) [1909] 1 K. B. 274.

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I do not myself attach any importance to the last three lines of the order, as I read them only as suggesting, not as deciding the existence of the reduction in value, and I therefore see no necessity for any amendment of the order, which appears to be in the same form as in the *Southwark Case*. (1) The first matter to be determined is the construction of the Valuation (Metropolis) Act, 1869. The Act commences (s. 5) by appointing an assessment committee; it then provides for three valuation lists—(1.) the quinquennial, (2.) the supplemental, in case of alterations during the preceding twelvemonth, and (3.) the provisional: all these three lists are to be prepared by the overseers, but in each case, if the overseers make default, the assessment committee "shall" appoint a person to make the list in their place, and in all these cases the assessment committee is the tribunal to whom objections (if any) to the list are to be sent and who are bound "to hear and determine" such objections. This being so, it is argued by the appellants that s. 47 is so worded as to enable, if not to compel, the assessment committee to decide whether there has or has not been any increase or reduction in value in the particular case before it can direct the valuation to be made which is the essential preliminary to their hearing and determining the case as the appellate tribunal, and that such decision is final; in other words, they must decide the case (apparently ex parte, for the surveyor of taxes is not there) before they can proceed to hear and determine it. I am of opinion that this is not the true construction of the section. It is of course clear that before any final and binding provisional list can take effect, where there is a dispute, the assessment committee must determine whether there has in fact been any increase or reduction within the section; but in order to give them jurisdiction so to determine certain preliminary steps have to be taken. The first step is the preparation of the list by the overseers. The overseers, however, cannot be compelled to make out this list, any more than they can be compelled to make out the quinquennial or the supplemental list; because the Act has provided an alternative course, and the Courts do not grant a mandamus to compel A. to perform a statutory duty when the

(1) [1909] 1 K. B. 274.

statute imposing it contemplates his failure to do so, and provides an alternative course in the event of such failure. This is the true ground of the decision in *Reg.* v. *Overseers of St. Mary, Bermondsey* (1): see especially the judgment of Hawkins J. at p. 356. It is true that both judges refer to the fact that it is unreasonable to expect the overseers, who are in a sense officials, to make out a list "which they know and feel to be fictitious and false," but their real decision is based on the right of the claimant, upon the refusal of the overseers, to require the assessment committee to appoint a valuer to make out the list on the overseers' default. The next step is plain: the clerk must forthwith summon the assessment committee, and they "shall appoint a person to make such provisional list": no power is given to them to go into evidence or to decide any question: they have simply to perform the clear duty imposed on them by the statute of appointing a person to make the lists. It is said that the words "such provisional list" imply an antecedent determination that there has been in fact an increase or reduction; but the very point to be determined by the committee when the case is properly brought before them is whether there has been such reduction or not, and I think it is clear that all the instructions to be given to the valuer are that "A. B. claims such and such reductions in respect of such and such premises, be so good as to make out a provisional list accordingly." The committee is neither required nor empowered to do anything else. They have no power to summon the surveyor of taxes, or to call evidence, or to hear argument, or still less to determine the value without hearing argument or evidence. As Walton J. says in *Rex* v. *Southwark Assessment Committee* (2), "their duty is not to value, but to appoint a valuer." If the requisition by the ratepayer were manifestly absurd, they could of course refuse, relying on the fact that no Court would in such a case issue a mandamus against them, but if they refuse, they do so at their peril. The existence of the provisional list is a condition precedent to their jurisdiction to hear and determine, and as the claimant is entitled to require them to hear and determine, they cannot refuse to take the steps

(1) 14 Q. B. D. 351. (2) [1909] 1 K. B. at p. 293.

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necessary to give rise to such jurisdiction; if they do, their refusal may be called in question in the High Court. No tribunal of inferior jurisdiction can by its own decision finally decide on the question of the existence or extent of such jurisdiction: such question is always subject to review by the High Court, which does not permit the inferior tribunal either to usurp a jurisdiction which it does not possess, whether at all or to the extent claimed, or to refuse to exercise a jurisdiction which it has and ought to exercise. Subjection in this respect to the High Court is a necessary and inseparable incident to all tribunals of limited jurisdiction; for the existence of the limit necessitates an authority to determine and enforce it: it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure—such a tribunal would be autocratic, not limited—and it is immaterial whether the decision of the inferior tribunal on the question of the existence or non-existence of its own jurisdiction is founded on law or fact; a Court with jurisdiction confined to the city of London cannot extend such jurisdiction by finding as a fact that Piccadilly Circus is in the ward of Chepe. With regard to the case now in question, Coleridge C.J.'s judgment in *Reg.* v. *Assessment Committee of St. Mary, Islington* (1) accords with the construction I put on it; at p. 532 he says: "The question here, and in every such case is, is there a prima facie case calling on the assessment committee to hear and determine the question of value? They may decide either in favour of or against the applicants upon the question of reducing the assessment, but I think they must decide it. That is the plain and simple construction of the Act of Parliament." The Lord Chief Justice was dealing with the question whether, in a case where the Court was asked in the exercise of its discretionary jurisdiction to grant a mandamus, there was a prima facie case to be heard and determined: if it was obvious that there was none, no mandamus would go, but if there was a prima facie case, then the claimant had a statutory right to have his case heard and determined and the mandamus would go; and this is I think the meaning of the present Lord

(1) 19 Q. B. D. 529.

Chief Justice in this case and in *Rex* v. *Southwark Assessment Committee.* (1) There is more difficulty about the dicta of Bigham J. at p. 292 and my brother Kennedy at p. 308 of the same case; but it is to be observed in that case that the matter had been gone into fully before the committee, and it may be that all that was meant was that in such a case the Court would not grant a mandamus to compel the case which had already been tried out to be tried over again, although the first trial was irregular. But the dicta are not necessary to the decision of the case; and the actual decision is in favour of the respondent in the present case.

The next question then arises, is there any justification for the refusal by the assessment committee to perform their statutory duty of appointing a valuer, or (to use the phrase adopted in the Divisional Court) is there not even a prima facie case for the assessment committee to hear and determine? Now there is no question of altering the list generally; it is merely the question whether there has been since the commencement of the present rating year an alteration in the value of these particular premises, due to some definable cause affecting the assessable value of these premises. Such cause must not be one which affects all property in the rating area, but it is not the less a cause affecting a particular property, because it affects all the property of that class in the area. The section refers to premises the value of which has altered "not by general economic or social change, but by change in their own individual conditions affecting value": *Camberwell Assessment Committee* v. *Ellis.* (2) [Having stated the facts and the finding of the assessment committee, the Lord Justice continued:—] My first observation on this finding is that the committee by calling it a question of fact cannot make it so: it is plain that the real question is one of law, namely, whether the increase of duty is a sufficient cause within s. 47. If it is not, cadit quæstio: if it is, then a question of fact may arise, namely, to what extent is the value reduced? On the question of law I am of opinion that there has been a reduction within s. 47. The problem to be solved is, what would the hypothetical tenant give for the

(1) [1909] 1 K. B. at p. 287. (2) [1900] A. C. 510, 523, 525.

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premises for a year, if the tenant undertook to pay all usual tenant's rates and taxes and tithe rent-charge, and the landlord undertook repairs and insurance and other expenses (if any) necessary to maintain the hereditament in a state to command that rent (s. 4)? To ascertain this, it is obviously important to ascertain the use which the tenant may expect to be able to make of the premises, the facility afforded by the premises for carrying on any particular trade and the nature of that trade being a primary consideration: *Cartwright* v. *Sculcoates Union.* (1) One of the chief elements in value of a public-house is the licence: the profitable use to which the premises can be put is dependent on the existence of the licence; and in estimating the amount of such profit as bearing upon the amount of rent obtainable the price to be paid for the licence necessarily comes into consideration: a privilege which costs 35*l.* is obviously more valuable than the same privilege when it costs 130*l.*; and when the question is whether the reasonable man will give the same rent for a licensed house the licence of which costs him 130*l.* as he would give for the same house the licence of which costs him 35*l.*, the only possible answer is in the negative. Test it in this way: suppose the new duty instead of being half the annual value were fixed at the whole annual value, is it not obvious that prima facie no one would take the house at all? If a house as a licensed house is worth 230*l.* a year when the licence costs 35*l.*, what rent could the landlord hope to get if the duty were raised to 265*l.*? It is not (as Channell J. points out in the Divisional Court) like the duty on the sale of tobacco: the tobacconist's shop is not valued as such: the licensed premises are, because the licence is not ambulatory, but is confined to a specific trade at a specified place. I do not think it necessary to express any opinion as to the meaning of "tenant's rates and taxes" in s. 4. The question is whether in ascertaining the special value to be attached to licensed premises the expense of obtaining the licence is to be taken into consideration; and unless one side only of the account is to be taken I can see no ground whatever for excluding it. It was suggested that arrangements might and probably would be made with a view to throwing the burden on to the

(1) [1900] A. C. 150, 159.

brewers or the public; but there has been no possibility of doing anything of the sort at present, and we are dealing with a sudden emergency that has arisen; and any particular arrangements with or by individual tenants would be irrelevant: the question is not what rent will a particular individual give, but what will the hypothetical tenant give: it is on this ground that the "tie" is disregarded in valuing tied houses; the hypothesis deals with the ordinary individual, not with a man bound by special covenants.

Then it was suggested rather than argued that s. 44 of the Finance Act, which imposes the duty, shews that this is not correct; but it is impossible to adopt a suggestion which would have the effect of making the Finance Act amend the Valuation Acts, the Income Tax Acts, the Water Acts, and probably many others, especially as s. 96 expressly mentions that certain Acts are to be construed with various parts of this Act, and the Valuation (Metropolis) Act is not one of them. The respondent, on the other hand, suggested that s. 44, sub-s. 2, last paragraph, and s. 87 are in their favour, and there are, no doubt, expressions therein which point in that direction; but I place no reliance on this. The Act is one of great complexity and obscurity, and I do not think that we ought to read incidental statements therein as amounting to positive enactments. I am of opinion that this appeal fails and must be dismissed with costs.

KENNEDY L.J. There can be no doubt that, as the Lord Chief Justice said in the course of his judgment in the Divisional Court, this case raises a very important question, and one of considerable difficulty. It is important for the holder of the licence in respect of the Crown and Shuttle, who finds himself under the Finance (1909–10) Act, 1910, obliged to pay a duty of 130*l.* instead of a duty of 35*l.* as before. It is important to all metropolitan ratepayers who are not tenants of public-houses; for, if the contention of the respondent is well founded, and the imposition under the Finance (1909–10) Act, 1910, of an increased licence duty constitutes a cause for the reduction of the valuation of the licensed house which he occupies, to the extent of the whole or of a material part of the licence, every other class of ratepayer

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may be seriously affected. So far as regards the contribution to the poor rate, the burden of the increased duty, to the amount of the consequent reduction in the valuation of the licensed house, will, in the absence of some compensating cause, be shifted, at least to some extent, by reason of the diminished rateable value of the public-houses, from the licence-holders, upon whom the statute has imposed it, to the shoulders of all other ratepayers who are not tenants of public-houses. Thirdly, the case is of importance as raising definitely for decision the difficult questions of the jurisdiction and the duty of an assessment committee under s. 47, sub-s. 2, of the Valuation (Metropolis) Act, 1869, and of the exercise of the discretion of this Court to review upon a motion for a mandamus the action of the committee, which were, to some extent, considered by this Court in *Rex* v. *Southwark Assessment Committee* (1), and which are of interest. The gravity of these considerations, especially as, whilst I do not differ in the result, I arrive at the result upon somewhat different reasoning from that of my colleagues of this Court, compels me to deal with the subject of this appeal at greater length than I should otherwise have wished.

The first and fundamental matter for our judgment on this appeal is the interpretation of s. 47. It appears to me that the appellants' counsel are right in insisting that the opening sentence governs the whole group of sub-sections. The creation of a provisional list is, according to the natural meaning of that sentence, made conditional upon circumstances arising in which the value of a hereditament in the course of some year is increased or reduced in value from a cause within the meaning of that sentence. The frame of the section is: "If, in the course of any year, the value of any hereditament is from any cause increased or reduced in value," then the overseers, under sub-s. 1, may make a provisional list "containing the gross and rateable value as so increased or reduced," and the assessment committee may either require the overseers to do so under sub-s. 1, or, under sub-s. 2, appoint a person to make "such provisional list." Having regard to the condition which the statute, in the opening words of this 47th section, has thus

(1) [1909] 1 K. B. 274.

expressly imposed, I am unable myself to see how it can be right to treat the functions either of the overseers under sub-s. 1 or of the assessment committee under sub-s. 2 as simply ministerial. The overseers, unless acting under the written requisition of the assessment committee, and the assessment committee alike are, in my judgment, bound, before taking steps to make, or have made, a provisional list, at least to see that the applicant, whether he asserts an increase in value or a reduction in value, makes out a prima facie case of proof that the statutory condition precedent exists. I do not think that the true view could be better put than it was by Mr. Ryde, who, whilst he asserted the power of the King's Bench Division to review the decision of the assessment committee, said, in answer to a question of mine, at the close of his clear and forcible argument, "The assessment committee has a duty to inquire whether there is a prima facie case fit for the appointment of a valuer. The mere ipse dixit of the ratepayer is not enough. They must see that a case is made out for the existence of a legitimate cause within the decision." It is upon this basis that this case has been dealt with expressly by Lord Alverstone C.J. and Channell J. in the Divisional Court and that *Rex* v. *Southwark Assessment Committee* (1) proceeded, both in the Divisional Court and in the Court of Appeal of which I was a member; and I should not have dwelt so much upon this part of the case, but that at one stage of their argument the learned counsel for the respondent appeared to me rather to contend that the assessment committee had to discharge a purely ministerial duty. The 4th, 5th, and 6th sub-sections, which deal with the procedure after a provisional list has been ordered and has been made, really do not touch sub-s. 2 at all. They merely enact in substance that where a provisional list has been made and is objected to—for otherwise it does not come before the assessment committee—the committee shall hear and determine on the objection and make such order as they think just. This determination, as I understand the enactment, deals with the figures of the valuation in the provisional list if made either by the overseers or pursuant to the order of the assessment committee

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under sub-s. 2. Probably no appeal lies against a provisional list as approved by the assessment committee: see Ryde on Rating, 2nd ed., p. 656.

It is unnecessary for me, after the full statement of the history of this case by the Master of the Rolls, to dwell upon the facts in any detail. [Having referred to the facts shortly, the Lord Justice continued:—] It appears to me that the first point to be decided is whether or not, if it be granted to the respondent that in fact the increase in the duty on the licence to a substantial extent affects the value of the house by diminishing the rent which the hypothetical tenant would be willing to pay, the increase of the duty can be a cause within the words "any cause" in s. 47. Tested by the reasoning of the opinions delivered in the House of Lords in *Camberwell Assessment Committee* v. *Ellis* (1), and especially by the opinion of Lord Davey at p. 523, the increase of the duty ought to be treated, I think, as a cause within the meaning of the section. The house is valued and rated more highly because it has a licence attached to it. The increase in the licence duty is a definable cause affecting unfavourably the value of the house as a licensed house, because the hypothetical tenant will, naturally, and in the ordinary course, have to consider this necessary outgoing in deciding what rent he can afford to pay for the tenancy. I agree with the Lord Chief Justice that the licence duty is not a usual tenant's rate or tax; but, on the whole, I agree with him also that the licence duty is so far a material element in the calculation of the rent that a substantial increase of that duty may constitute a cause of reduction in the value of the house within the words of s. 47, and none the less so because other licensed houses may be similarly affected by the same definite cause. I think that the criticisms of Mr. Danckwerts and Mr. Ryde, the respondent's counsel, upon the affidavits of Mr. Robinson and Mr. Bramham, upon which the appellants sought, on the hearing of the motion for a mandamus, to found an opposite inference, were well founded. But then follows that which appears to me to be a more difficult question. Granted that an increase of the licence duty is, in its nature, capable of being a cause of a substantial reduction of value within the

(1) [1900] A. C. 510.

meaning of s. 47 (I may say, in passing, that alike in the case of a supplemental and of a provisional list the alteration must be substantial: see per Cockburn C.J. in *Reg.* v. *New River Co.* (1)), did the respondent furnish evidence upon which the assessment committee could properly act, even as prima facie evidence, that this possible cause has in fact so operated in the case of the Crown and Shuttle? Like my brother Channell in the Court below, I have felt some doubt—indeed, in my own case, I must say considerable doubt—upon this point. I asked counsel whether any case could be cited in which a claim for the making of a provisional list or a supplemental list—they stand upon the same basis in this respect—had been approved by the Court, except where, as in the *Southwark Case* (2), to which I have referred, from evidence of fact, such as a diminution of receipts, there was some tangible proof of an actual fall in value. I understood them to say that they did not know of any such case. Clearly a ratepayer cannot rightly ask for the making of a provisional list on the ground of a purely contingent or even probable reduction in the value of the hereditament. Quia timet would be no ground for the relief given by s. 47. The present case appears to me to be very near the line. But, for the reason given by Channell J., the practical certainty, in the absence of proof of countervailing circumstances, that so material an increase in licence duty must affect the amount of the tenant's profit, and, therefore, the rent which he will agree to pay for the house, I am prepared not to differ from the conclusion upon this point at which the Divisional Court and, as I know, my colleagues in this Court have arrived.

The one remaining point which requires notice is that of the interference by this method of procedure by mandamus with the determination of the assessment committee. It is urged by their counsel that, as they have come to a conclusion which is based expressly upon a finding of fact, a writ of mandamus cannot properly be issued by the Court to reverse the decision. Now I think that the King's Bench Division, alike in the case of an inferior Court and in the case of a statutory authority, such as

(1) 4 Q. B. D. 309, 312. (2) [1909] 1 K. B. 274.

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the assessment committee under the Valuation (Metropolis) Act, 1869, has a power to examine facts stated by the inferior tribunal, whether on a motion for a prohibition or for a mandamus: see *Liverpool Gas Co.* v. *Everton.* (1) Where the evidence upon which the inferior tribunal has decided in exercising or refusing to exercise jurisdiction is conflicting, that circumstance, though not conclusive upon the Court so as absolutely to deprive it of the discretionary power of granting the prohibition or the mandamus, will so far influence the Court that very strong ground will be required before it interferes with the decision. That is the language of Blackburn J. in *Elston* v. *Rose.* (2) In *Rex* v. *Southwark Assessment Committee* (3) the judgment of the Divisional Court, making absolute the rule for the issue of a mandamus to the assessment committee of the borough of Southwark to appoint a person to make a provisional list under s. 47, was affirmed by the Court of Appeal; but if the decision of this assessment committee can properly be treated, as it purports to be, as a decision on a point of fact, that case cannot, in my view, properly be regarded as an authority in favour of the respondents here, because two members at least of the Court of Appeal, Vaughan Williams L.J. and myself, held, as we both appear in the report to have expressly stated, that the assessment committee in that case had come to a wrong conclusion of law. Speaking for myself, I see no reason to alter the opinion which I said in the course of my judgment in the *Southwark Case* (3) that I was disposed to adopt, and which Lord Mersey (then Bigham J.) had still more definitely asserted when that case was before the Divisional Court, that, if an assessment committee, in dealing with an application under s. 47, sub-s. 2, comes, upon evidence, to a conclusion of fact, their decision ought not to be reviewed upon an application for a mandamus to compel them to do something which would only have been justified by their having arrived at an opposite conclusion of fact. But, of course, in so saying, I assume that there is some evidence upon which the finding of fact can be supported. If, however, the applicant, under s. 47, has established a prima facie case before the assessment committee, and there was

(1) L. R. 6 C. P. 414. (2) (1868) L. R. 4 Q. B. 4, at p. 8.
(3) [1909] 1 K. B. 274.

no evidence to answer or contradict it, then I think that the mere allegation of the assessment committee that they have found as a fact that the hereditament has not been reduced in value can create no absolute bar to the review by the King's Bench Division of the decision of the assessment committee. As I have already stated in the course of this judgment, I am of opinion that a reduction in the value of the Crown and Shuttle by the operation of the section may be a cause within s. 47, and also, upon the whole, that the respondent in the present case laid before the assessment committee a prima facie case that from this cause there had in fact in the course of this year been a reduction in value of the licensed premises, owing to the operation of that cause. So far as I can see, the assessment committee had not really before them any evidence—and for my part I think the assessment committee might have received such evidence—either to answer or modify this prima facie case made by the applicant. In these circumstances it became the duty, I conceive, of the committee to act upon the prima facie case made by the applicant, namely, proof of a fact which, if proved, entitled the respondent under the statute to the appointment of some person to make a provisional list. There is a good deal to be said for the view that the question under discussion might be treated, as the Master of the Rolls has suggested in his judgment, as a matter of law.

For these reasons I am of opinion that this appeal should be dismissed.

I desire only to add that I could not attach any weight either to the argument of the appellants founded upon s. 44 of the Finance Act or the argument of the respondent founded upon s. 47 of the Valuation (Metropolis) Act. It does not appear to me that either of these arguments is really relevant to the question whether the imposition of the increased licence duty is a cause affecting the value of the licensed premises within the meaning of s. 47 of the latter Act.

Appeal dismissed.

After some discussion, it was arranged that the order should be amended by altering the words "as reduced" since the

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making of the valuation list now in force to "as alleged to be reduced."

Solicitors: *H. Mansfield Robinson; Godden, Son & Holme.*

W. C. D.

C. A. 1910 *July* 27, 28.

[IN THE COURT OF APPEAL.]

METROPOLITAN WATER BOARD *v.* LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY.

London—Water Rate—Domestic Purposes—Railway Purposes—Railway Station—Sanitary Conveniences—Metropolitan Water Board (Charges) Act, 1907 (7 *Edw.* 7, *c. clxxi.*), *ss.* 8, 16, 25.

The Metropolitan Water Board (Charges) Act, 1907, provides by s. 8 for a supply of water for "domestic purposes" at the request of the owner or occupier of any house or building occupied as a separate tenement within the limits of supply of the Metropolitan Water Board at a rate based on the rateable value of the house or building. The same Act by s. 16 provides for a supply of water by measure for "purposes other than domestic" at the request of any owner or occupier of any premises situate as therein described at rates varying with the quantity supplied. By s. 25 "domestic purposes" are deemed to include water closets and baths of a certain capacity, but are not to include a supply of water for "railway purposes."

A railway company owned a station situate as described in s. 16 and within the limits of supply of the Board. The station was separately rated; it contained no stationmaster's house, but contained waiting rooms, a porters' room, and a booking office; on the up and down platforms were urinals and two water closets, one for passengers and one for the staff; there was also on each platform a tap from which water was drawn for drinking and for cleansing the platform:—

Held, that the water supplied by the Board for these purposes was supplied for "railway purposes" within s. 25 and was therefore supplied for "purposes other than domestic" within s. 16.

Decision of Divisional Court (Phillimore and Bucknill JJ.), [1910] 1 K. B. 804, affirmed.

APPEAL from the decision of a Divisional Court (Phillimore and Bucknill JJ.). (1)

The plaintiffs on March 31, 1909, brought an action in the county court to recover a sum of 12*l.*, the amount of four quarters'

(1) [1910] 1 K. B. 804.

water rate alleged to be due from the defendants in respect of their West Norwood railway station.

The West Norwood railway station was separately rated at 300*l.* gross value and 240*l.* rateable value. In this station there was no stationmaster's house, but only the usual waiting rooms, porters' room, and booking office. On the up and down platforms were urinals for gentlemen and two water closets, one for passengers and the other for the use of the staff. There was also on each platform a draw-off water tap from which was drawn water for cleansing the platform and whatever might be required for drinking.

The water supplied by the plaintiffs to the defendants was used by the latter for the urinals and water closets and for washing and drinking purposes, all in connection with the railway. Until the Metropolitan Water Board (Charges) Act, 1907, came into force, water supplied to this station for these purposes was always charged for by meter.

The plaintiffs contended that the water had been supplied to the defendants for "domestic purposes" within the meaning of s. 8 of the Metropolitan Water Board (Charges) Act, 1907, and that consequently by the same section they were entitled to charge at a rate per annum not exceeding 5 per centum of the rateable value of the building in respect of which the water was supplied.

The defendants paid into Court the sum of 8*l.* 9*s.* 2*d.* together with 18*s.* for costs in satisfaction of the claim. They contended that the water was supplied for "purposes other than domestic" within the meaning of s. 16 of the Metropolitan Water Board (Charges) Act, 1907, being supplied, as they alleged, for "railway purposes" within the meaning of s. 25 of that Act (1), and

(1) The Metropolitan Water Board (Charges) Act, 1907, provides:—

Sect. 25: "In and for the purposes of this Act the expression 'domestic purposes' shall be deemed to include water closets and baths constructed or fitted so as not to be capable of containing when filled or filled up to the overflow or waste pipe (if any) more than eighty gallons but shall not include a supply of water for any of the following purposes (namely): — Steam gas motor and other like engines; railway purposes; ventilating purposes; working any machine or apparatus; consumption by or washing of horses or cattle; washing carriages or other vehicles; watering gardens by means of any outside tap or any hose tube pipe sprinkler or other like apparatus; fountains or any orna-

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that they were liable as for a supply by measure and not otherwise.

It was admitted that if the water was supplied for "domestic purposes" within the meaning of s. 8 of the Act the plaintiffs were entitled to recover 12*l.*, but that if it was supplied for "purposes other than domestic" within the meaning of s. 16 of the Act the defendants were liable to pay 8*l.* 9*s.* 2*d.* and no more.

The county court judge held that the water was supplied for "purposes other than domestic" within the meaning of s. 16 of the Act and gave judgment for the defendants, and, on appeal, his decision was affirmed by the Divisional Court.

The plaintiffs appealed.

Danckwerts, K.C., and *A. B. Shaw*, for the appellants. The sole question is whether the water supplied to the railway station in this case is supplied for domestic purposes. The judges below seem to have been under the impression that the railway company was bound by the Board of Trade or other public authority to provide these conveniences. That is not so. The only powers of the Board of Trade over railways are those given by ss. 5 and 6 of the Railway Regulation Act, 1842 (5 & 6 Vict. c. 55), to inspect lines before they are opened. The Railway Commission have powers under the Railway and Canal Traffic Act, 1854, to see that railway companies provide "reasonable facilities for receiving and forwarding traffic," which includes passengers, but it is not within their power to order the provision of conveniences of this kind: *South Eastern Ry. Co.* v. *Railway Commissioners* (1); *West Ham Corporation* v. *Great Eastern Ry. Co.* (2)

In *Busby* v. *Chesterfield Waterworks Co.* (3) it was decided

mental purpose; cleansing sewers and drains; cleansing and watering streets or roads; fire extinction; flushing drains by means of any apparatus discharging automatically; public pumps baths or washhouses; any trade manufacture or business; any bath constructed or fitted so as to be capable of containing when filled or filled up to the overflow or waste pipe (if any) more than eighty gallons."

(1) (1881) 6 Q. B. D. 586.

(2) (1895) 9 Ry. & Ca. Tr. Cas. 7; 64 L. J. (Q.B.) 340.

(3) (1858) E. B. & E. 176.

that washing a carriage was a domestic purpose, but that was overruled by the Waterworks Clauses Act, 1863, s. 12, where the meaning of "a supply of water for domestic purposes" was defined in negative terms by stating what it did not include. There are numerous cases in which the meaning of a supply for domestic purposes has been dealt with, of which *Liskeard Union* v. *Liskeard Waterworks Co.* (1), *Cooke* v. *New River Co.* (2), and *Barnard Castle Urban Council* v. *Wilson* (3) are examples, but the result is clear that the question is to be decided by the purposes for which, and not by the nature of premises to which, the water is supplied. A controversy arose in some of the earlier cases as to the effect of the word "dwelling-house" which occurred in the earlier Acts, but in s. 8 of the Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), which provides for supply of water for domestic purposes, the phrase is deliberately altered to "house or building or part of a house or building," so that question no longer arises. Even under the older Acts the fact that a house was used for business purposes did not prevent there being a supply for domestic purposes: *Pidgeon* v. *Great Yarmouth Waterworks Co.* (4); *South West Suburban Water Co.* v. *St. Marylebone Union* (5); *Chester Waterworks Co.* v. *Chester Union* (6); *Frederick* v. *Bognor Waterworks Co.* (7) *South Suburban Gas Co.* v. *Metropolitan Water Board* (8), which is a decision under this Act, is on all fours with this case so far as the water is used by the railway company's own staff, and the principle applies to the use by passengers. The Board do not claim rates upon any part of the station which can be shewn to be a separate building not supplied with water, but the occupier cannot, in estimating the value of the premises assessed, deduct that part which is derived from a business carried on there, or from the amenity of a garden for which water is not supplied: *West Middlesex Waterworks Co.* v. *Coleman* (9); *Bristol Waterworks Co.* v. *Uren.* (10) The judges in the Court below laid

(1) (1881) 7 Q. B. D. 505.
(2) (1888) 38 Ch. D. 56.
(3) [1902] 2 Ch. 746.
(4) [1902] 1 K. B. 310.
(5) [1904] 2 K. B. 174.
(6) (1907) 96 L. T. 566; (1908) 98 L. T. 701.
(7) [1909] 1 Ch. 149.
(8) [1909] 2 Ch. 666.
(9) (1885) 14 Q. B. D. 529.
(10) (1885) 15 Q. B. D. 637.

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special stress on the exclusion of "railway purposes" from domestic purposes in s. 25 of the Board's Act. But in the earlier part of the same section it is expressly enacted that "domestic purposes" shall be held to include water closets, and that cannot be overruled by the latter part. The Board are under no obligation to supply water for domestic purposes in gross, but only in a building.

Younger, K.C., and *M. L. Gwyer*, for the respondents. Prima facie a supply to a railway station is not for domestic purposes. In all the cases except *South Suburban Gas Co.* v. *Metropolitan Water Board* (1) "domestic purposes" have been held to mean only use for private purposes in connection with a building of the nature of a house. Lord Campbell in *Busby* v. *Chesterfield Waterworks Co.* (2) confines it to private purposes. In *Liskeard Union* v. *Liskeard Waterworks Co.* (3), *Barnard Castle Urban Council* v. *Wilson* (4), and *Pidgeon* v. *Great Yarmouth Waterworks Co.* (5) the user was always by persons who were residents or persons spending a long time in a building which could be regarded as a house. It is submitted that in *South Suburban Gas Co.* v. *Metropolitan Water Board* (1) Neville J. went too far and that his decision cannot be supported, but it is distinguishable from this case because the supply was wholly for the use of employees, and it was decided on an admission in the argument that supply for urinals was prima facie for domestic purposes. The proviso in s. 16 of the Act, which provides for supply of water by meter, that "the whole of the water taken within any railway premises . . . . shall be reckoned as one supply" shews that all water supplied to a railway station was expected to lie within that section and not within s. 8. In all the definitions given of "domestic" in the standard dictionaries the element of home and privacy is accentuated: The Oxford English Dictionary; The Century Dictionary; Johnson's Dictionary; Latham's English Dictionary; Webster's English Dictionary. Is this supply, "trade," or "domestic"? If the purpose is in truth and in fact "railway" the mere

(1) [1909] 2 Ch. 666.
(2) E. B. & E. 176.
(3) 7 Q. B. D. 505.
(4) [1902] 2 Ch. 746.
(5) [1902] 1 K. B. 310.

fact that as incident to that purpose some of the water is used for a domestic purpose does not make it water supplied for a domestic purpose within s. 25. "Domestic" means for the use of a man in his home. As was said by Lord Shaw in *Clover, Clayton & Co., Ld.* v. *Hughes* (1), where a statute has been interpreted by a long line of cases each of which goes a little farther than the one which preceded it, there is much danger of being landed very far from the meaning of the statute itself. In *West Ham Corporation* v. *Great Eastern Ry. Co.* (2), a doubt was expressed by two of the Railway Commissioners whether a railway company could be compelled under the Railway and Canal Traffic Act, 1854, to supply water closets at its stations for the use of its passengers, but it is submitted that the view of Sir Frederick Peel that water closets were a reasonable appendage to a station is correct.

A. B. Shaw, in reply. "Domestic purposes" and "purposes other than domestic" as used in this Act are technical terms having regard to the long line of decisions upon them. Buckley J. in *South West Suburban Water Co.* v. *St. Marylebone Union* (3) supplied the true criterion, namely, that it is the character of the purpose, not the character of the premises in which the water is used, that is the important factor. A supply to a railway station does not necessarily involve that it is a supply for railway purposes. "Railway purposes" means distinctly railway purposes.

COZENS-HARDY M.R. It has seldom been my duty to construe, or attempt to construe, an Act of Parliament more difficult than this. I regret that a great body like the Metropolitan Water Board, dealing with an enormous population, should in the year 1907 have obtained, not by a public Act, but by a local and personal Act, such a section as is to be found in this Act. But there it is; and it is our duty to put such an interpretation upon the section as upon the whole seems to us more consistent than any other with the language which has been used.

The question is a very short one. This is the case of a railway

(1) [1910] A. C. 242, at p. 256. L. J. (Q.B.) 340.
(2) 9 Ry. & Ca. Tr. Cas. 7; 64 (3) [1904] 2 K. B. 174.

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company having a comparatively small station with a general waiting room, a ladies' waiting room on each platform, and water closets and urinals on each side, with a distinction between the passengers and the staff, and for ladies and gentlemen, and the question is whether the supply of water by the Metropolitan Water Board to the railway company for these purposes is a domestic supply, and to be paid for on a 5 per cent. basis on the rateable value of some part of the station, or whether it is not a domestic supply, and therefore, in the absence of agreement, is to be paid for by meter. That involves the construction of the definition clause, s. 25, in the Act of 1907. [The Master of the Rolls read the section.]

Now, a more confusing section can scarcely be imagined. To deliberately say that domestic purposes are not to include the cleansing or watering of streets or roads seems to me absurd. But then we are told that a domestic supply is not to include "railway purposes." In my view this case depends really on the meaning which is to be attached to the words "domestic purposes." A railway is in a peculiar position; it has been for a very long time, ever since railways were started, subject to peculiar legislation. In the early days of railways, so far as I have been able to ascertain, there was no power to compel railway companies to furnish sanitary conveniences of this kind for the use of passengers. But, when we arrive at the Railway and Canal Traffic Act, 1854, there was a new statutory provision, the material part of which, for the purposes of to-day, is to be found in s. 2: "Every railway company . . . . shall . . . . afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways." I do not read the rest of the section. Now, "traffic" in the definition of that section includes passengers. It is a curious phrase, I admit, but the railway company is bound to afford reasonable facilities for receiving, forwarding, and delivering traffic; and I cannot myself doubt that a railway company is bound under the provisions of that section to afford reasonable lavatory accommodation in its stations for the use of its passengers, and that it is compellable by the Railway Commissioners so to do. Then you find here that the railway company is put in a

different position from everybody else. This was in the year 1854. When Parliament uses, in this s. 25, the words "railway purposes," I think it is not unnatural or improper to say that that must at least include a purpose or duty which is imposed on the railway company as such by virtue of special statutory powers dealing, not with the mass of the public or householders, but with the railway company as such. If so, quite apart from the old authorities, and even assuming that the provision of this lavatory accommodation might be a domestic purpose within the meaning of this Act, but for the words that I have read, I think it is taken out of the operation of that section, because it is expressly said that it is not to include the supply of water for, amongst others, "railway purposes." If that be so, the only difficulty is caused in my mind by the fact that there is in this case a special separate lavatory for the use of the porters and staff. But when Parliament enacted, as they did, that there should be a special treatment of railway companies dealing with every station on their line, I certainly should hesitate to say that it was not also their duty to provide at those stations reasonable accommodation for their staff, and, if necessary, to provide for that staff, in the way which we know it ordinarily does, by a private and separate place where the staff, and the staff only, are allowed to go. This really is the view which was taken by the Divisional Court; they based their judgments on the words "railway purposes." I do not myself quite go with all they said about domestic purposes apart from railway purposes; but I think in this case there is sufficient to enable us to say that the accommodation which every railway company as a railway company does furnish and is bound to furnish in every station in the kingdom is something which is taken out of this Act, and is not for the purpose of this Act to be called a domestic purpose.

A great deal has been said about the judgment of Neville J. in *South Suburban Gas Co.* v. *Metropolitan Water Board*. (1) That was a case as to which it is not necessary for us to say whether it was right or wrong; it seems to me to deal with a different problem. In the first place, it was not a railway

(1) [1909] 2 Ch. 666.

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company at all; it was a gas company. In the next place, it was a case in which for their very large works the plaintiffs had an independent supply by a well of their own, which they used solely for the purposes of their trade or business. They only required some water from the water company in that case, not for their trade purposes, nor for their manufacturing purposes, but simply for the lavatory and other accommodation for the men employed in those gas works. That may have been right or wrong—I do not desire myself to indicate an opinion either way—but it is quite distinguishable from the present case. Nothing that I have said is intended to be inconsistent with that case. In my view this case depends on the words, which were not applicable there, "railway purposes."

On that ground I think the appeal fails and must be dismissed with costs.

FARWELL L.J. I am of the same opinion. I agree that s. 25 is a most difficult section; and, doing the best I can, I have come to the conclusion that the decision of the Divisional Court was correct. I am not disposed to quarrel with the definition expressed by Buckley L.J., and adopted by Neville J., that the true test is, not whether the premises are used for business purposes or for domestic purposes, but whether the water is so used. If this case is to be decided on the old authorities, I should be of opinion that if the convenience is for the use of the general public, it could not be called "domestic purposes," on the same ground on which it has been held that a swimming bath which is used for instructing scholars in swimming was not used for a domestic purpose, although a private bath in a private house might very well be so. The public are not entitled to come on the railway station at all times as they like; they come by virtue of the ticket which they have paid for, and which entitles them to be admitted to the station and all the rooms in the station which the company is bound to provide for their convenience.

I think it is necessary in this case to decide the question on the Act of 1854, whether these conveniences are imposed upon the company as necessary reasonable facilities for passenger

traffic. In my opinion they are. There is no express decision on the point. It has been held in *Singer Manufacturing Co.* v. *London and South Western Ry. Co.* (1) that a cloak room is a facility that must be supplied. And in the case of *West Ham Corporation* v. *Great Eastern Ry. Co.* (2) Collins J. merely says that he desires to keep his mind open on the question whether a water closet for the use of passengers is a reasonable facility for receiving, forwarding, and delivering the traffic. He refers to the judgments of Lord Selborne and Lord Esher in *South Eastern Ry. Co.* v. *Railway Commissioners* (3), where they said that a refreshment room was not. The distinction between closets and refreshment rooms is perfectly clear and intelligible, and I do not think I can do better than adopt what Sir Frederick Peel said in that case. I am citing from 64 L. J., p. 346: "In the case of passenger traffic the railway company is bound to provide at the station all such accommodation as the reception of passengers at that station may reasonably call for. Passengers go to the stations in order to be forwarded by the particular trains, and they cannot leave the station until the trains arrive by which they are going forward. They may not and frequently do not know, what time these trains are due, and the trains may not always arrive at the time when they are due. Passengers therefore are necessarily detained at the station for a longer or a shorter time; and under these circumstances, especially as in the present case, where the number of passengers is large, it seems to me that closets are as reasonable an appendage to the station, as a waiting room or platform." I entirely agree with that; and I do so notwithstanding but with all respect for Lord Cobham's doubt. He puts it on the particular facts of each case; and he says that it would depend upon the station itself. In my opinion, urinals and closets are reasonable facilities which the railway company is bound to provide at all its stations for passengers.

It is also, in my opinion, bound to provide them for the porters; the passengers are entitled to have the assistance of

(1) [1894] 1 Q. B. 833, 836. (2) 9 Ry. & Ca. Tr. Cas. 7.
(3) 6 Q. B. D. 586.

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porters, and the porters are on duty for many hours. It is absolutely impossible that the railway company can dispense with these conveniences for the use of the porters as well as for the use of travellers.

I then come to the question, What is the meaning of "railway purposes" in this Metropolitan Water Board Act? In my opinion, it includes all those things which the railway company can be compelled by Act of Parliament to provide for the purpose of working the line efficiently. It is noticeable that the Act does still preserve the distinction between domestic purposes and trade purposes which may be found in the same building, as is shewn by s. 9. It is plain that a place used for trade purposes, and trade purposes only, is contemplated as a place in which water may possibly be required for use for domestic purposes. But it is curious that the Act, while so providing for trade purposes, says not a word about "railway purposes." In my view, the intention was that railway companies should stand on a different footing altogether and that they are to be treated as separate entities. For this purpose, what we have to consider is what is a railway purpose; and having once arrived at the conclusion which I have already stated that a railway purpose includes all that a railway company can be compelled to supply, it excludes any question of domesticity; and it is quite immaterial whether the thing so supplied would extend properly to porters, or at any rate under the old law might possibly have been held to be a domestic purpose, and not a trade purpose.

For these reasons, I think the appeal should be dismissed.

KENNEDY L.J. I am of the same opinion. There is no doubt that this is an obscure section. I feel at the end of the arguments, with all the assistance of counsel and an elaborate examination of the authorities, extremely unwilling to answer the question what "domestic purposes" are. But I am relieved from that difficulty by the fact that the governing words of this section, so far as the subject of this action is concerned, are "railway purposes"; and certainly all those things in the nature of conveniences of this sort which the railway company can be treated as compellable to provide, and to keep in a state

of efficiency by the supply of water, seem to me to be clearly intended by the words "railway purposes"; and, therefore, the question of domesticity, if it would otherwise arise, is excluded by the fact that you have got something which is within the term "railway purposes."

Speaking for myself, I am not prepared to say that the railway purposes in reference to this section are confined absolutely to the things which the Railway Commissioners could compel the railway company to provide. I wish at any rate to leave that point open. What I do think is, that at any rate those conveniences which the railway company is compellable to provide are things which fall within the term "railway purposes" as used in this section. The fact that the railway company was under certain statutory obligations was certainly referred to as an important element by my brother Bucknill at page 816 of the report. It is obviously merely a slip that he said it was admitted that the railway company is bound by the Board of Trade to provide these conveniences. That is not so. So far as I can see, although there are provisions in the Act of Parliament dealing with railways which I read as entitling the Board of Trade from time to time to send inspectors, who must be admitted to every part of the railway, including the rooms of the station, there is no section which gives the Board of Trade the power, either on complaint, or of their own motion, to compel the creation of these conveniences. Possibly it was left, so far as the Legislature was concerned, to sanitary legislation. But here, when you have the expression "railway purposes" distinguished from "trade, manufacture or business," it seems to me, when we have to decide this critical question, to be a proper inference that the section includes under the term "railway purposes" all those conveniences which are so far generally railway purposes as that they are by legislation things which the Legislature, acting through the Railway Commissioners, can compel the railway company to provide for the proper conduct of its railway business.

From the first the main difficulty, to my mind at any rate, has been with regard to conveniences provided for the staff. There is no doubt that, in regard to this point, the facts of this

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case come very near those in the case decided by Neville J.; but it would have been very unsatisfactory to deal with this part of the case separately, because, as indeed is said by my brother Phillimore in the course of his judgment, no special point was made as to these particular conveniences, and we have been dealing on appeal with a matter that was really in no way pressed or treated as a substantive separate question in the arguments in the Court below. Upon the whole it seems to me that when you have a railway business which must be conducted with porters, you may again properly, I will not say take refuge from the obscurities of this section, but you may properly choose as the least objectionable view that which we have taken in regard to the passengers. Here there is no doubt that the railway company must have for the fulfilment of its purposes porters, and the porters must have or ought to have conveniences of this kind. Therefore it may be, and I think it is, on the whole, true that we cannot treat the case which we have here as exactly on all fours with the case before Neville J., in which the only words that could be referred to were the words "trade, manufacture or business."

For these reasons I am prepared to say, whether the case before Neville J. was rightly or wrongly decided, that we ought to affirm the decision of the Divisional Court in the present case.

Appeal dismissed.

Solicitor for appellants: *Walter Moon.*
Solicitor for respondents: *P. V. Rose.*

H. B. H.

[IN THE COURT OF APPEAL.]

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July 8, 22.

SKATES *v.* JONES & CO.

Employer and Workman—Compensation—Sub-contracting—"Work undertaken by the principal"—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 4, *sub-s.* 1.

To constitute a man a principal under s. 4, sub-s. 1, of the Workmen's Compensation Act, 1906, the existence of both a head contract and a sub-contract is not necessary; the section extends to the case of a man who for the purposes of his trade or business undertakes work on his own account, and employs a contractor to do the whole or part of the work, provided that the work is such as the person employing the contractor usually undertakes for another in the ordinary course of his trade or business, but not otherwise.

Therefore where two shopkeepers and a billiard saloon keeper proposed to open a skating rink and purchased an existing iron building for that purpose, and contracted with a builder for the removal and re-erection of the building, and a workman employed by the builder in the re-erection met with an accident arising out of and in the course of his employment and applied for compensation against the purchasers of the building:—

Held, that the work of re-erection was not work "undertaken" by the respondents within the meaning of the Act, and that the applicant was not entitled to recover.

APPEAL from an award of the judge of the Pontypridd County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The respondents J. D. Jones and Lewis Jones carried on the business of greengrocers at Tonypandy in Wales. The third respondent Meycock kept a billiard saloon at the same place.

In the autumn of 1909 the three respondents conceived the idea of opening a skating rink at Tonypandy, and for this purpose they purchased an iron building at Kingston-on-Thames used as a drill hall. They then contracted with Thomas Howarth, a London builder, for the removal of the building and the re-erection of it at Tonypandy. The exact terms of the contract did not appear. Towards the end of November or in the beginning of December, 1909, after the commencement of the work, Howarth had an interview with J. D. and Lewis Jones, and as the result of that interview (as the county court judge found) the original contract was modified in the following respects, namely,

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that the three respondents agreed to pay the railway carriage and the ironmonger's bill and to do the painting themselves, but was not otherwise altered. Howarth employed a number of workmen (including the applicant) whom he brought down from London to put up the building. On January 19, 1910, the applicant, who was working upon the roof of the building, fell and sustained an injury to his leg. He claimed compensation against the respondents. The respondents denied liability on the ground that at the time of the accident the applicant was not in their employment nor were they principals within s. 4, sub-s. 1, of the Act. (1)

The learned county court judge came to the conclusion upon the evidence that the applicant was at the time of the accident the servant of Howarth; that the relationship of master and servant never existed between the respondents and the applicant; and that the work on which the applicant was employed was not work undertaken by the respondents as principals within the meaning of s. 4, sub-s. 1, of the Workmen's Compensation Act, 1906. He therefore made an award in favour of the respondents.

The applicant appealed.

David White, for the appellant. The respondents are liable under s. 4, sub-s. 1, of the Act. They were starting a new

(1) Sect. 4, sub-s. 1, of the Workmen's Compensation Act, 1906: "Where any person (in this section referred to as the principal), in the course of or for the purposes of his trade or business, contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this Act which he would have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from or proceedings are taken against the principal, then, in the application of this Act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the employer by whom he is immediately employed:

"Provided that, where the contract relates to threshing, ploughing, or other agricultural work, and the contractor provides and uses machinery driven by mechanical power for the purpose of such work, he and he alone shall be liable under this Act to pay compensation to any workman employed by him on such work."

business—the business of running a skating rink—and it was part of their business that they should have their skating rink. The contract which they entered into with Howarth was for the purpose of their trade or business, and it was for the execution of work "undertaken" by the respondents within the meaning attributed to that word by Lord M'Laren in *Zugg* v. *J. & J. Cunningham, Ld.* (1); and see *Dittmar* v. *Owners of Ship V* 593. (2)

Albert Parsons, for the respondents. The question turns upon the meaning of the words "undertaken by the principal" in s. 4, sub-s. 1, of the Workmen's Compensation Act, 1906. Those words must have some limiting effect and are intended to limit the scope of the section. There has been some conflict of opinion as to their meaning. In *Walsh* v. *Hayes* (3) the Court of Appeal in Ireland took the narrowest view of these words and held that they implied some contractual obligation on the principal to do the work. In *Zugg* v. *J. & J. Cunningham, Ld.* (4) the Lord President adopted the Irish view, but Lord M'Laren took the contrary view and thought that a man might be a principal within the Act without any contractual obligation. Then in *Spiers* v. *Elderslie Steamship Co., Ld.* (5) the Lord Justice-Clerk took the same view as Lord M'Laren, subject to the limitation that in order to constitute a man a principal within s. 4 the operation must be one which falls within the usual course of his ordinary business. That view of the section would no doubt cover the case of a speculative builder who was building a house as a speculation, but it would not affect the present respondents. In England there is no authority precisely in point. In *Mulrooney* v. *Todd* (6) the decision rested on s. 13, but there is a dictum of the Master of the Rolls shewing that upon the construction of s. 4 as a whole it is impossible to limit it to the case of sub-contracting. *Dittmar* v. *Owners of Ship V* 593 (2) is not in

(1) (1908) S. C. 827, 831; 1 B. W. C. C. 257, 262.
(2) [1909] 1 K. B. 389.
(3) (1909) 43 Ir. L. T. 114; 2 B. W. C. C. 202.
(4) (1908) S. C. 827.
(5) (1909) S. C. 1259; 2 B. W. C. C. 205.
(6) [1909] 1 K. B. 165.

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point, because it was one of the ordinary duties of the coalowners in that case under their articles of association to carry on the business of lightermen. The respondents here do not contend that the words must be so construed as to make the section apply only where the alleged principal is under some contractual or statutory obligation, but if the widest view of the section is adopted the effect would be to treat the words "undertaken by the principal" as entirely superfluous, and the section would then extend to any person who for the purposes of his business contracts with anybody to do anything for him, e.g., a surgeon contracting for the installation of electric light in his surgery. The true view is that the section extends (*a*) to persons acting under a contractual obligation and sub-letting work and (*b*) to persons not acting under any contractual obligation whose usual business it is to do such work, i.e., who undertake it in the popular sense. Applying that test, the erection of a skating rink was no part of the usual business of these respondents.

David White, in reply, cited *Knight* v. *Cubitt & Co.* (1)

Cur. adv. vult.

July 22. COZENS-HARDY M.R. This appeal involves the construction of s. 4 of the Workmen's Compensation Act, 1906. It is one of the most difficult sections of the Act, and different views have been held in Scotland and Ireland, if not also in this country.

In substance it corresponds to s. 4 of the Act of 1897, though there are very material differences. The word "undertaker" was a most important word in the Act of 1897 (see s. 7), but it is not found in the Act of 1906. The word "undertaken," which is found in s. 4 (1.) and (4.), seems to be a survival from the Act of 1897. One view, and perhaps the most natural view, of the section is that it applies only where there is a sub-contract. In the words of the Lord President in *Zugg* v. *J. & J. Cunningham, Ld.* (2), "To get the state of affairs contemplated by the section there must be an undertaking by A. to perform the work for B. and a sub-contract between A. and C. (whose immediate servant the

(1) [1902] 1 K. B. 31. (2) [1908] S. C. 827.

workman is) to perform the work undertaken." But in the same case Lord M'Laren took a wider view and said that a company may be held to have "undertaken" a work though it was under no contractual obligation to do so, at least where the work was of a nature which the principal professes to perform as part of his trade or business. In *Walsh* v. *Hayes* (1) the Court of Appeal in Ireland held that the expression "work undertaken," read in conjunction with the words "in the course of or for the purposes of his trade or business," implied some obligation on the principal to do the work, and that a farmer who contracted for the services of a threshing machine (not falling within the proviso to sub-s. 1) was not liable to pay compensation to a man injured in the course of working the machine with whom the farmer had no contractual relation. In *Spiers* v. *Elderslie Steamship Co., Ld.* (2) it was held by the Court of Session that shipowners who contracted for the cleaning of the boilers in one of their vessels were not liable to pay compensation to a man employed by the contractor who was injured by an accident. In the words of the Lord Justice-Clerk, "It was part of their business to have their boilers in good condition, but not to do the operations to put them in good condition."

I think the application of the section cannot be limited to a case where there are two contracts, namely, a head contract and a sub-contract, although that is the common case to which the section applies. This has, in truth, been decided by this Court in *Mulrooney* v. *Todd*. (3) That case turned upon s. 13, which declares that the exercise and performance of the powers and duties of a local or other public authority shall "for the purposes of this Act"—which obviously includes s. 4—be treated as the trade or business of the authority. There was a statutory duty, but no contractual obligation, binding the corporation, and we held that s. 4 applied. It seems to me that the only question open to discussion in this Court is this: Was the particular work "undertaken" "in the course of or for the purposes of" the trade or business of the principal? It is not everything done in

(1) 2 B. W. C. C. 202. (2) [1909] S. C. 1259.
(3) [1909] 1 K. B. 165.

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the interest of the trade or business which falls within this section. I shrink from saying that a cotton spinner who finds one of his boilers out of order and contracts with a boilermaker to replace it with a new boiler is liable to pay compensation to one of the workmen employed by the boilermaker. That work was *required* by the cotton spinner, but not "*undertaken*" by him. He never held himself out as a boilermaker. It was not part of his trade or business to erect boilers, and the whole section has no application to him. If, however, a man who carries on the trade of a builder builds a house for himself, but contracts with another builder to do part of the work, I think such a case would fall within the section. This construction of the section is consistent with the views of Lord M'Laren and the Lord Justice-Clerk.

It only remains to apply the above principles to the particular case before us. The facts appearing on the notes of the learned county court judge are not very clear, but we were invited by the respondents' counsel to assume that the facts were as follows, and the appellant's counsel agreed to this. The respondents, who are greengrocers, entered into a joint venture with a billiard saloon keeper for the erection of a skating rink as a speculation. They contracted with Howarth to do part of the work. We have not seen the contract. Howarth employed Skates, who was injured by an accident. The county court judge has found that Skates was throughout the servant of Howarth, and that the relationship of master and servant never existed between Skates and the respondents, and that the work on which the applicant was employed was not work undertaken by the respondents as principals within the meaning of s. 4. So far as these are findings of fact it is not competent to us to review them, but I may add that I see no reason to question their accuracy. On the question of law I think he arrived at a right conclusion. The building was not work "undertaken" in the course of or for the purposes of their business.

The appeal must be dismissed with costs.

FARWELL L.J. Sect. 4 of the Act is not the least obscure of its many obscure sections, and in this case counsel has suggested

three possible constructions, one of which has been adopted by the Lord President in *Zugg* v. *J. & J. Cunningham, Ld.* (1), one by the Irish Court of Appeal in *Walsh* v. *Hayes* (2), and the third we are invited by the appellant to adopt in England. The first is that the section is confined to sub-contractors in its proper sense: that is, to cases where a contractor, who has contracted to do work for another, sub-contracts with other persons to carry out part or parts of it for him. This is the view taken by the Lord President, although not, as I gather, by the other members of the Court. The second is that the section is not so confined, but extends also to cases in which "the principal" has undertaken certain work on his own account, such work being such as he usually undertakes for others in the course of his own trade or business, and has employed other persons to carry out part or parts of such work for him: this is, I think, the construction adopted in Ireland. The third is, that it includes all work undertaken by any person in the course of or for the purpose of his trade or business, whether it is in the ordinary course of such trade or business or not. In my opinion one or other of the two first is the true construction, and it is impossible to read the section as the appellant suggests. Such a construction would give no meaning to the words "undertaken by the principal," which are obviously inserted by way of limitation. We are not entitled to use the marginal note as a guide to construction, and I do not rely on it; but the section appears to me to have been originally intended to apply to the contractor who sub-lets part of his contract and then to have been developed on the basis that a contractor who does work for another on contract is in the same position towards the workman as the contractor who does the same class of work in the usual way of business for himself and sub-lets part of it, and this explains the words "undertaken by the principal" as including the man who undertakes in the usual course of his business to do the work, whether for himself or for another. The builder or decorator may be said to undertake the work of building or decorating a house whether he does it for himself or for another; but a banker or a grocer neither builds nor decorates as part of

(1) 1 B. W. C. C. 262. (2) 2 B. W. C. C. 202.

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his trade or business, and no one would say that either of them had undertaken the building or decorating: it is the builder or decorator employed by him who undertakes the work: the only undertaking by the banker or grocer is to pay for such work. This is shewn by the words "in the course of or for the purposes of his trade or business." While there is no reason for drawing a distinction between a building undertaken by a builder for himself and a building undertaken by him under contract for another, there is equally no reason for drawing a distinction between a building contracted to be done for a grocer by way of addition to his shop and a building contracted to be done for a private resident next door by way of addition to his dwelling-house; but the words "in the course of or for the purposes of his trade or business" shew that the private resident is not within the section. The man of business or tradesman is not made a principal because he is in business or in trade, but because the particular work in question is his own trade or business; and this is the true construction of the section in my opinion. It only remains for me to state shortly why, with great respect to the Lord President, I am unable to agree with the construction adopted by him. I have already said that there is no obvious reason for drawing a distinction between a man, for instance a builder who undertakes buildings on his own account and sub-lets portions of the work and a builder who undertakes buildings under contract with a third person and sub-lets portions of the work; but, in addition, there are provisions in the Act which seem inconsistent with a construction that confines its operations to the latter. There is first the proviso to s. 4 on which the Master of the Rolls has already remarked in *Mulrooney* v. *Todd* (1): I do not go so far as to say that this is conclusive, because it is not expressed in terms as an exception. An exception shews that the matter excepted is part of the principal matter unless taken out of it: a proviso does not necessarily affirm that it is such part, but is consistent with the mere possibility or probability of such a construction, but it may be so worded as to suggest that the Legislature does in fact regard it as part, and I think

(1) [1909] 1 K. B. 165.

that that is the true construction of this proviso. Further, s. 13 confirms this view, and I am not sure that the point is not in fact covered by the decision in *Mulrooney* v. *Todd*. (1) By this section, the local or other public authority acting in exercise and performance of their powers are made the person acting "in the course of or for the purposes of his trade or business" within the meaning of s. 4, and the words "the whole or any part of the work undertaken by the principals" apply to these authorities as well as to individuals. But local and public authorities do not act as contractors for other persons; they have their own work committees and do their own work, but I doubt if there was in 1906 a single local or public authority with power to do business as a contractor, and not merely in cases of default by the owner of compliance with some statutory requirement, for any one other than themselves. It would at any rate be very rare, and this again shews that s. 4 must have the meaning that I attach to it. The facts in this case have been already stated by the Master of the Rolls, and they shew in my opinion that the respondents are not within s. 4, and this appeal should be dismissed.

KENNEDY L.J. In regard to the law of this case, I have come to the conclusion that in view of the proviso of s. 4, the importance of which was pointed out by the Master of the Rolls in his judgment in *Mulrooney* v. *Todd* (2), I cannot construe the principal clause of this rather obscure section as I certainly should otherwise have construed it, and as it has been construed by the Lord President in *Zugg* v. *J. & J. Cunningham, Ld.* (3), and, if I appreciate correctly the brief summary of the judgment in the report, by the Court of Appeal in Ireland in *Walsh* v. *Hayes* (4), namely, as applying, in the case of private traders only where there are both a principal contract and a sub-contract. In regard to a local or public authority to which s. 13 applies, I am bound by the judgment of this Court in *Mulrooney* v. *Todd* (1) to hold that it may be itself "the principal" within the meaning of the fourth section. But all the three

(1) [1909] 1 K. B. 165.
(2) [1909] 1 K. B. at p. 170.
(3) 1 B. W. C. C. 262.
(4) 2 B. W. C. C. 202.

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judgments in that case expressly reserved the case of the private trader.

Being obliged by what seems to me to be a necessary inference from the proviso to admit a wiser interpretation of the section than one which would limit its operation to the cases in which there is both a principal contract and a sub-contract, I have come to the conclusion, after a careful consideration of the Act itself and of the reported cases which are relevant to this particular section, that the least objectionable interpretation of the words "work undertaken by the principal" is that which I understand to be put forward by Mr. Parsons and Mr. Allen in their valuable work upon the Act, namely, that besides that which I should call the natural sense of a contractual undertaking, these words include the performance of work which the principal may be said to "undertake" because he has adopted it as his particular trade or business. This interpretation would accord with the view taken by Lord M'Laren in *Zugg* v. *J. & J. Cunningham, Ld.* (1), and by this Court in *Dittmar* v. *Owners of Ship V* 593 (2), and at the same time it recognizes as correct the limitation maintained by the Court of Session in *Spiers* v. *Elderslie Steamship Co., Ld.* (3)

If this view is the true view of the effect of s. 4, the judgment of the learned county court judge in the present case is clearly right.

Two shopkeepers named Jones and the keeper of a billiard saloon named Meycock were minded to join together in running a skating rink at Tonypandy in Wales. They bought an existing iron structure at Kingston-upon-Thames, and made some contract, the exact terms of which do not appear, with one Thomas Howarth to remove the structure from Kingston to Tonypandy. Skates, the applicant, was employed by and worked for Howarth on this job and met with an accident. He claimed against the trio who speculated in the skating rink venture. It appears to me that the learned county court judge rightly held that the claim was not one which could be maintained under s. 4. There was only a single contract, the

(1) 1 B. W. C. C. 262. (2) [1909] 1 K. B. 389.
(3) 2 B. W. C. C. 205.

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one between the trio and Howarth; and the trio were not "undertakers" of the work of removing or erecting buildings as, or as part of, their trade or business. They were therefore not "principals" within the section. The fact (if it be the fact) that they paid the ironmongers and either themselves did some painting or procured it to be done does not appear to me to alter the situation.

I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *S. A. Clench & Co.*

Solicitors for respondents: *Smith, Rundell & Dods, for Evan Davies, Cardiff.*

H. B. H.

[RAILWAY AND CANAL COMMISSION.]

1910 *July* 14.

MANCHESTER SHIP CANAL COMPANY *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

Railway—Rates—Reasonable Facilities—Agreed Through Rates—Application for Through Rates of same Amount but differently apportioned—Jurisdiction of Railway Commissioners—Railway and Canal Traffic Act, 1888 (51 & 52 *Vict. c.* 25), *s.* 25.

The Railway and Canal Commissioners have no jurisdiction under s. 25 of the Railway and Canal Traffic Act, 1888, to entertain an application for a new apportionment between the several railway companies over whose lines through traffic is carried of an existing through rate for that traffic.

Where an agreed through rate for through traffic over the lines of two or more railway companies is in existence, and the apportionment of the rate between the railway companies has been agreed upon, and there is no threat on the part of any of the companies to withdraw the rate, the Railway and Canal Commissioners have no jurisdiction to entertain an application for an order for a through rate of the same amount as the existing rate but differently apportioned between the several railway companies.

SUMMONS taken out by the defendants for an order that all further proceedings in the application be stayed on the ground

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that the application and the schedules attached thereto disclosed no cause of action or grounds of proceedings against the defendants under the Railway and Canal Traffic Acts or at all, or alternatively for an order that so much of the application and schedules as related to the apportionment of the through rates referred to therein be struck out on the ground that the Railway and Canal Commissioners had no jurisdiction under the said Acts or otherwise to apportion the said rates under the circumstances set forth in the application.

The application was in the following terms :—

"The applicants state as follows :—

"1. They are a railway company within the meaning of the Railway and Canal Traffic Acts and the owners of railway lines and sidings which afford facilities for through communication between the Manchester Ship Canal and Manchester Docks and places in the United Kingdom including those referred to in the schedule hereto.

"2. The defendants are a railway company whose lines form the remaining part of the through routes for railway traffic between the Manchester Ship Canal and Manchester Docks and the said places.

"3. By letter dated 23rd April, 1910 (copy of which letter and the enclosures therein contained are set forth in the said schedule hereto), the applicants proposed to the defendants the through rates and the apportionments thereof as set forth in the said enclosures.

"4. By letter dated 3rd May, 1910 (copy of which is also set forth in the schedule hereto), the defendants objected to the proposed rates and to the apportionments thereof.

"The applicants apply to the Court of the Railway and Canal Commission under the above-mentioned Acts for :—

"1. An order allowing the said through rates and the apportionments thereof as set forth in the schedule to this application (being the through rates and apportionments proposed by the applicants in their said letter of 23rd April, 1910)."

The letter of April 23, 1910, referred to above and set out in the schedule to the application, was as follows :—

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"The Manchester Ship Canal Company,
Secretary's Office, 41, Spring Gardens,
Manchester,
23rd April, 1910.

"To the Secretary,
London and North Western Railway Company,
Euston Square, London, N.W.

"Dear Sir,

"Through rates between Manchester Docks and London and North Western Stations.

"I beg on behalf of the Manchester Ship Canal Company to propose for the acceptance of your company through rates under the provisions of the Railway and Canal Traffic Acts for the forwarding of general merchandise traffic at class and exceptional rates between the Manchester Docks and the stations on the London and North Western Railway as set out in the schedule attached to this letter.

"The rates proposed are of the same amount as those set out in the rate-books of the Manchester Ship Canal Company and of the London and North Western Railway Company for traffic between the docks and the stations referred to. The details of the rates shewing the stations, amounts, routes, and apportionments proposed are fully set forth in the schedule hereto.

"Yours faithfully,
"F. A. Eyre,
"Secretary."

The schedule to the letter set out the names of a number of stations on the London and North Western Railway and the amounts of the proposed rates for merchandise between Manchester Docks and each of the stations referred to, and it stated that the rates included the provision at Manchester by the Manchester Ship Canal Company of all terminal accommodation and terminal services incidental to the railway traffic referred to, and conveyance by the Manchester Ship Canal Company over their lines to and from the London and North Western Railway Company's junction at Weaste, conveyance by the London and North Western Railway Company between the

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said junction and the several stations on their railway above referred to, and the provision by the London and North Western Railway Company at such stations of the terminal accommodation and services incidental to such railway traffic, except where the rates for such traffic were noted as with private sidings.

The schedule then set out the proposed routes for the traffic from the Manchester Docks to the said stations of the London and North Western Railway Company, and it also stated the proposed apportionments of the said through rates as between the Manchester Ship Canal Company and the London and North Western Railway Company.

The letter of May 3, 1910, from the defendants, referred to in the application and set out in the schedule thereto, was as follows :—

"London and North Western Railway,
Assistant Goods Manager's Office,
Euston Station,
London, N.W.,
May 3rd, 1910

"Dear Sir,

"Through rates between Manchester Docks and London and North Western Stations.

"I have to acknowledge the receipt of your letter of the 23rd ultimo, proposing on behalf of the Manchester Ship Canal Company under the provisions of the Railway and Canal Traffic Acts certain rates with Manchester Docks. The existing through rates were agreed to by the London and North Western Company on the basis that that company and the Manchester Ship Canal Company should each receive certain amounts out of the rates. The effect of the present proposals of the Ship Canal Company would be to increase the amounts at present received by them, and to bring about a corresponding decrease in the amounts at present received by the London and North Western Company, and the proposed apportionment is inequitable and unfair having regard to the services rendered by the respective companies.

"Under these circumstances I have to object on behalf of

the London and North Western Company to the proposed rates and the apportionment thereof.

"Yours truly,
"W. A. Jepson.

"F. A. Eyre, Esq.,
Manchester Ship Canal Co.,
41, Spring Gardens, Manchester."

The defendants before putting in an answer took out the above summons, which was referred into Court for hearing.

Sir Alfred Cripps, K.C., and *J. A. Simon, K.C.* (*Lynden Macassey* with them), for the defendants. Where there is a through rate in existence, and it is not proposed to have it altered, and there is an existing apportionment of it, the Court has no power to entertain an application for a reapportionment of that through rate different from that in force. Under s. 25 of the Railway and Canal Traffic Act, 1888, the Railway Commissioners have jurisdiction to order a through rate for through traffic as a reasonable facility in the interest of the public, and the apportionment of that through rate by the Commissioners is merely ancillary to the grant of the through rate. The apportionment of the rate is not itself a reasonable facility; it does not affect the public interest in any way. The basis of the jurisdiction of the Commissioners under s. 25 is the application for a through rate as a facility to the public. By s. 25 reasonable facilities for the receiving, forwarding, and delivering of traffic within s. 2 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), include the receiving, forwarding, and delivering of through traffic at through rates. Then follows a proviso upon that enactment containing nine sub-sections. The true effect of a proviso in a statute is to restrict and not to extend the operation of the enactment to which it is a proviso. If the language of the enacting part does not contain the provisions which are said to be there, they cannot be imported by implication from the proviso: *West Derby Union* v. *Metropolitan Life Assurance Society*. (1) The obligation of a railway company to quote a through rate arises from the direction in the Railway and Canal

(1) [1897] A. C. 647, at pp. 652, 653, 655, 656.

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Traffic Acts to afford reasonable facilities to the public for through traffic. It does not arise because the Railway Commissioners make an order for a through rate. If it is a question whether it is a reasonable facility in any particular instance that there should be a through rate, the Commissioners will determine that question, and, if they allow the through rate, will as ancillary to that apportion the rate. In the present case that statutory obligation has been recognized by the two companies concerned by agreeing upon through rates and the apportionment thereof. One of the two companies who have agreed upon those through rates cannot apply under s. 25 of the Act of 1888 for a different apportionment of the existing through rates. The applicants can ask for a different through rate, and then the Court can make an order for a new rate, and when so doing it can apportion the new rate between the companies. The sub-sections of the proviso to s. 25 bear out this view. Sub-s. 1 speaks of "the proposed through rate." By sub-s. 3 "the rate shall come into operation" if at the expiration of the prescribed time no objection is made to it. By sub-s. 5, if objection is made, the Commissioners shall consider whether the granting of a rate is "a due and reasonable facility in the interest of the public." Sub-s. 6 provides that "where, upon the application of a person requiring traffic to be forwarded, a through rate is agreed to by the forwarding companies, or is made by order of the Commissioners, the apportionment of such through rate, if not agreed upon between the forwarding companies, shall be determined by the Commissioners." That sub-section deals with the case of a member of the public requiring traffic to be forwarded, and not one of the forwarding companies. Sub-ss. 7 and 8 clearly deal with a proposal for a through rate, and not with a through rate which is already in existence. The whole section is based upon an application being made for a through rate, and that lets in the jurisdiction of the Commissioners. It is not dealing with an existing through rate. The Court has no jurisdiction to entertain an application for a different apportionment of an existing through rate, whether the apportionment has been determined by the Court or fixed by agreement. Upon the face

of this application it appears that there are existing through rates, agreed upon between the applicants and the defendants, between the docks and the various stations, and there is no objection to the amount of the existing through rates, the only objection being to the apportionment. The application, therefore, is merely for a new apportionment of existing through rates so that the applicants may get a larger proportion of those through rates. The applicants do not ask to have new through rates made. They are content with the existing through rates. The application, therefore, discloses no cause of action or ground for proceedings under the Railway and Canal Traffic Acts, and the proceedings ought to be stayed.

Balfour Browne, K.C., and *R. Whitehead*, for the applicants. The application does not state that the proposed rates are the same as the old rates; it only states that they are of the same amount as those set out in the rate-books. The rates may be of the same amount and yet may be different by reason of the proposed routes being different. There is nothing on the face of the application to shew that there are through rates in existence. Even if there are through rates in existence, the applicants are entitled to apply to the Court to have through rates fixed under the Act as a reasonable facility in the interest of the public. The proposed through rates are new rates. There are three elements in a through rate: amount, route, and apportionment. Here, so far as appears, the amount alone is the same as that of the existing rate. The route proposed may be different and the apportionment may be different. If the elements, or one of the elements, making up the through rate are different, the rate cannot be the same rate, though the total amount may be the same. An apportionment of a through rate is not merely ancillary to the grant of the rate; it is an essential part of the rate. A through rate is made up of the various sums apportioned to each of the carrying companies, and the total of those sums is the through rate. It is a reasonable facility in the interest of the public to have a through rate fixed by the Court, though the amount payable by the public may be the same as before. A rate so fixed is of a permanent nature and cannot be terminated, like an agreed through rate, at

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the option of one or all of the companies concerned. A through statutory rate, therefore, is different from an agreed through rate. The application here fulfils the requirements of s. 25 of the Railway and Canal Traffic Act, 1888. The applicants are a company requiring traffic to be forwarded, and they have given written notice of the proposed through rates and their apportionment, as required by sub-s. 1. The defendants have objected to the proposed rates, and therefore the Commissioners must, under sub-ss. 4 and 5, decide the matter, and in doing so they must determine the apportionment under sub-ss. 6, 7, and 8. The apportionment depends upon the route, and if a shorter route is proposed the apportionment may be different. The applicants may satisfy the Court, when the case is heard on its merits, that, in consequence of the proposed routes over the defendants' lines being shorter or more cheaply worked than under the agreed through rates, the apportionment ought to be different. Sub-s. 7 assumes an agreement as to the total of the through rate and a dispute only as to the apportionment, which the Court must determine. The applicants are not applying for an apportionment of the existing through rate, but for an order for a statutory through rate and for an apportionment of that rate. In *Greenock and Wemyss Bay Ry. Co.* v. *Caledonian Ry. Co.* (1) the Commissioners made an order for through rates at the amounts then in existence. A through rate fixed by the Court, though of the same amount as the existing through rate, may be a reasonable facility in the interest of the public, and whether it is so or not in fact is a question to be tried on the merits. The Court therefore has jurisdiction to hear this application.

Further, if this application is to be considered as merely an application for a new apportionment of existing through rates, the Court has jurisdiction under s. 25 to entertain it. Circumstances may have changed since the through rates were agreed to, and the existing apportionment may be unjust, though the total amount of the rates may be fair. Sub-ss. 7 and 8 shew that the Court has jurisdiction to entertain the application.

J. A. Simon, K.C., in reply. There may be a difference

(1) (1875) 2 Ry. & Ca. Tr. Cas. 227, at pp. 233, 235.

between an agreed through rate and one fixed by the Court, but s. 25 does not say that it is a reasonable facility in the interest of the public for the receiving, forwarding, and delivering of traffic that there should be a through rate fixed by the Court. The through rate is the reasonable facility, and the public have already the advantage of the existing through rates, and there is no threat to withdraw them. The Court therefore has no power to vary the apportionment of an existing through rate.

A. T. LAWRENCE J. We have come to the conclusion that the objection to this application is well founded. The application appears to me to be one to have existing through rates apportioned differently from the manner in which they have hitherto been apportioned between the applicants and the defendants. That, in my opinion, is a matter which, so long as the through rates stand unchallenged, it is outside our jurisdiction to entertain. Sect. 25 of the Railway and Canal Traffic Act, 1888, deals with reasonable facilities for the receiving, forwarding, and delivering of traffic upon and from the several railways concerned, and it includes in the reasonable facilities which a railway company must give under s. 2 of the Railway and Canal Traffic Act, 1854, the due and reasonable receiving, forwarding, and delivering of through traffic at through rates, tolls, or fares, at the same time giving a person interested in the through traffic the right to ask for through rates for such traffic. So long as through rates are in existence and are not in any way threatened the reasonable facility of the through rates exists. In such a case it does not seem to be of any benefit to any one to apply to the Court to have through rates of the same amount fixed, nor does the Act seem to contemplate such an application. Through rates already exist in the present case, the traffic being carried at agreed through rates which it is not proposed to disturb. I do not think that there is anything in the Act which lends any colour to the contention put forward on behalf of the applicants that it is a reasonable facility in the interest of the public that there should be what has been called a statutory through rate, that is to say, one fixed by this Court. I do not say that such a

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A. T. Lawrence J.

rate is not of a more permanent nature than a through rate existing only by agreement, but the permanence is not a reasonable facility, and, in my opinion, the Court would only have jurisdiction to make such a rate if the existence of the agreed rate were in any way threatened. I should be quite ready to assent to the contention that, if it were stated on the face of the application that there had been a threat or something in the nature of a threat to withdraw the rate, so that the existence of the rate was imperilled, an application might be made to the Court in the nature of a quia timet application to have a through rate fixed so as to prevent disturbance to the through traffic by the withdrawal of the existing rate. In such a case an application to the Court would be justified, but, with every desire to extend the usefulness of the Court, I do not think that we ought to hold that this Court has any jurisdiction to entertain at any moment an application to reapportion existing through rates. If the through rate is cancelled, then an application can be made to the Court to fix a through rate, and the fact that a through rate has existed would be evidence for the consideration of the Court as to what is reasonable. But the argument has not convinced me that s. 25 in any of its subsections contemplates that the Court should deal with existing through rates for the purpose of reapportioning the amount between the companies over whose railways the traffic is carried.

The objection, therefore, is a good one, and the further proceedings under the application must be stayed.

SIR JAMES WOODHOUSE. I am of the same opinion for the same reasons.

Order to stay proceedings.

Solicitors for applicants: *Grundy, Forshaw, Samson & Co.*
Solicitor for defendants: *C. de J. Andrewes.*

W. F. B.

MERCHISTON STEAMSHIP COMPANY, LIMITED v. TURNER.

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March 4.

Revenue—Income Tax—Profits of Trade, Manufacture, &c.—Average of Three Years preceding Year of Assessment—Trade first set up within Period of Three Years—Single Ship Company—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 100; *Sched. D, Case* 1, *r.* 1.

By s. 100 of the Income Tax Act, 1842, and by case 1, r. 1, in Sched. D of that Act, duty to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule of the Act, is to be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern upon a fair and just average of three years, ending on such day of the year immediately preceding the year of assessment on which the accounts of the said trade, manufacture, adventure, or concern are usually made up, or on the 5th day of April preceding the year of assessment; provided always, that in cases where the trade, manufacture, adventure, or concern has been set up and commenced within the said period of three years, the computation is to be made for one year on the average of the balance of the profits and gains from the period of first setting up the same.

A limited company registered under the Companies Acts, 1862 to 1900, was formed to purchase and trade with a certain steamship mentioned in the memorandum of association, and, in the event of the loss, sale, or disposition of that vessel or of any vessel subsequently acquired, to acquire from time to time some other steamship, but so that the company should not own at any one time more than one ship; and the company was to carry on the business of shipowners with respect to such steamship. The articles of association provided that there should be a manager of the company in lieu of directors; that the manager might insure the steamship for the time being owned by the company; and that he might in the event of the loss of the steamship for the time being owned by the company, with the approval of the shareholders, buy another steamship out of the proceeds of the insurances of the ship so lost, or he was to divide and pay the net proceeds of the insurances rateably amongst the shareholders and wind up the company.

The company acquired the steamship mentioned in the memorandum of association and traded with her from 1901 till April 1, 1906, when she was lost at sea. In May, 1906, the manager of the company, with the approval of the shareholders, purchased a second steamship out of the proceeds of the insurances on the first. On October 17, 1906, the company commenced trading with the second steamship:—

Held, that the company carried on one trade or adventure throughout with the two ships in succession, and that the trade or adventure which

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they carried on with the second ship was not first set up on October 17, 1906, when that ship began trading.

Therefore, for the purpose of assessment to income tax for the year 1907-8,

Held, that the company were to be assessed on the balance of their profits and gains on an average of three years preceding the year of assessment, and not for one year on the average of the balance of the profits and gains from October 17, 1906.

CASE stated by the Commissioners for the General Purposes of the Income Tax Acts on an appeal by the Merchiston Steamship Company, Limited, against an assessment made in respect of the profits of the steamship *Veraston* for the year ended April 5, 1908.

The appellants were a limited liability company registered under the Companies Acts, 1862 to 1900. The memorandum of association stated the following as the objects for which the company was formed :—

"(A) To adopt and carry out without modification, or with such alterations, if any, as may be agreed upon, an agreement dated May 8, 1901, and made between Messrs. William Gray & Co., Limited, of West Hartlepool, of the one part, and Messrs. Walter Scott & Co. of the same place of the other part."

[This was an agreement that the parties thereto of the first part should build and sell and that the parties of the second part should purchase a steamer, details of which were embodied therein.]

"(B) To purchase or otherwise acquire, charter or otherwise hire, contract for the building of, equip, sell, repair, let out to hire, and trade with the said steamship referred to in the said agreement.

"(C) In the event of the loss, sale, or disposition of the said vessel or of any vessel subsequently acquired, to acquire from time to time some other steamship, but so that the company shall not own at any one time more than one ship.

"(D) To carry on the business of shipowners in all its branches with respect to such steamship and any other business connected therewith, or which may for the time being be expedient to be carried on therewith.

"(E) To employ as ship's husband, managers, and general

agents of and for such steamship any person, firm, or company, and that although he or they may or may not be entitled to any share or interest in the company."

The articles of association contained the following provisions:—

"69. There shall be a manager of the company in lieu of directors.

"75. (*l*) He may insure the steamship for the time being owned by the company and the freights thereof in such manner and for such amounts as he may consider reasonable and proper, and he may in addition cover the said ship against ownership, collision, and other risks in such manner and to such an extent as he may consider proper.

"(*m*) He may, in the event of the loss of the said steamship for the time being owned by the company, with the approval of the shareholders in general meeting, buy another steamship by and out of the proceeds of the insurances of the ship so lost, or he shall divide and pay the net proceeds of such insurances rateably amongst the shareholders in the company and wind the company up."

In accordance with article (B) of the memorandum of association the appellants in the year 1901 purchased the steamship *Merchiston* and commenced trading with her. For the years 1901-2 to 1905-6 inclusive the appellants were duly assessed to income tax in respect of the profits of the *Merchiston*, the assessments being based upon the audited voyage accounts of that ship which were embodied in the printed balance-sheets of the appellants.

On April 1, 1906, the *Merchiston* was lost in a collision at sea. The sole income of the appellants for the period from October 14, 1901, to April 1, 1906, consisted of the profits from the trading of the *Merchiston*, all the sixty-four shares of which were owned by the appellants.

In May, 1906, the manager of the appellants, with the approval of the shareholders in general meeting, contracted for the building of a steamship, the *Veraston*, out of the proceeds of the insurance money of the *Merchiston*, which was, as soon as collected, paid at various dates to the builders of the *Veraston*.

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That vessel was duly delivered and registered at the port of West Hartlepool, all the sixty-four shares being held by the appellants. She commenced her first voyage on October 17, 1906. The appellant company was not wound up, and no alteration was made in the capital of the company.

The *Merchiston* and the *Veraston* did not trade between any definite ports or upon any definite route, nor was either of them engaged in any definite trade, but they carried whatever goods were likely to be remunerative, going from port to port in all parts of the world. Both steamers were what is commonly known as "tramp" steamers.

By s. 100 of the Income Tax Act, 1842, the duties under Sched. D to the Act are to be assessed and charged under the rules there set out. The first case under that section applies to duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of a trade, not contained in any other schedule of the Act.

The first rule under that first case provides as follows: "The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern upon a fair and just average of three years, ending on such day of the year immediately preceding the year of assessment on which the accounts of the said trade, manufacture, adventure, or concern shall have been usually made up, or on the 5th day of April preceding the year of assessment, and shall be assessed, charged, and paid without other deduction than is hereinafter allowed: Provided always, that in cases where the trade, manufacture, adventure, or concern shall have been set up and commenced within the said period of three years, the computation shall be made for one yea on the average of the balance of the profits and gains from the period of first setting up the same . . . ."

The assessment for the year 1907-8 of the appellants' profits, which formed the subject of this appeal, was based upon the voyage accounts of the steamship *Veraston* from October 17, 1906, which shewed a profit equivalent to 2045*l.* for the year, from which an allowance was made under s. 12 of the Customs

and Inland Revenue Act, 1878 (41 Vict. c. 15), for depreciation, giving a net assessment of 1009*l.*

The Merchiston Steamship Company appealed from this assessment.

The Commissioners were of opinion that the assessment was properly based upon the accounts of the *Veraston* only, but at the request of the Merchiston Steamship Company they stated a special case in which the foregoing facts appeared.

A. A. Roche, for the appellants. This assessment has been made on the footing that the business of the appellants came to an end on the loss of the *Merchiston*, and that the business which they were carrying on with the *Veraston* was a business first set up on October 17, 1906, when that ship began trading. That is a false basis for the assessment. From beginning to end the appellants were carrying on one business, first with the *Merchiston* and then with the *Veraston*. When the former vessel was lost the shareholders had no right to demand repayment of their capital. By the memorandum of association the appellants have power to deal with their vessel as they please; they may sell the ship and purchase another with the proceeds of that sale. The memorandum also speaks of "any vessel subsequently acquired." On the loss of one steamship the appellants may, as in the present case they did, "acquire from time to time some other steamship." They are incorporated to carry on the business of shipowners "with respect to such steamship," which must mean the first or any subsequently acquired steamship. It is true that they are not at any one time to own more than one steamer, but that is a limitation upon their plant or machinery and not on the business carried on therewith. In the case of a company owning several ships, if one ship were lost and another purchased in its place, the assessment would be made in accordance with the main provision in case 1, r. 1, to Sched. D, and not in accordance with the proviso; for it could not then be said that the business of such a company was first set up on the purchase of the new ship. There is no difference in principle between

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the case of a company owning several ships and that of a company owning but one ship. The assessment in this case ought to have been made on the average profits and gains of the appellants for the three years preceding the year of assessment according to the principal enactment in case 1, r. 1, in Sched. D to the Act, and not on an average for one year taken from the date when the *Veraston* began trading; and the assessment should be one-third of the actual profits or gains made during those three years.

Sir W. S. Robson, A.-G., and *W. Finlay*, for the respondent. The assessment was correct. The appellants were incorporated for the purpose of carrying on adventures by means of ships, and were prevented by their memorandum of association from carrying on more than one such adventure at any one time. The adventure carried on by means of the *Merchiston* ceased when that vessel was lost. From April 1 to October 16 no adventure was being carried on by the appellants. On October 17 a new adventure was commenced with the *Veraston*. No. 75 (*m*) of the articles of association contemplates the winding up of the company on the loss of the vessel with which they are to carry on their trade or adventure.

Roche in reply.

BRAY J. In my opinion the appellants are entitled to succeed. The finding of the Commissioners seems to me to be based upon a misapprehension, and therefore I cannot look upon it as a finding on a question of fact upon which there could be no appeal. All the facts are before me, and I have to determine what is the proper conclusion of law to be drawn from them.

The question is this: whether a new business was set up and commenced when the first ship was lost and the second ship was built. I do not think a new business was set up or commenced. I think it was from beginning to end one business, the business of steamship owners, with this limitation, that there should never be more than one steamship owned at any one time. This appears from the appellants' memorandum of association, of which the first object is to adopt and carry out a certain

agreement for the building and purchase of the ship, and the second object is to acquire and to trade with the ship. If the memorandum of association had stopped there, then the business of the appellants would have been concerned with that one steamship, and that business would have come to an end with the loss of that steamship. But the memorandum of association does not stop there; it provides what is to happen on the loss of the steamship; no new company is to be formed; the old company is to go on with its business, and is, in the event of the loss, sale, or disposition of the said vessel or of any vessel subsequently acquired, to acquire from time to time some other steamship, but so that the company shall not own at any one time more than one ship. That is the key to this case. The appellants are to carry on a continuous business. When they have bought that one ship they are to carry on business with that one ship, but when that ship is lost, sold, or disposed of they may acquire another and go on with the same business, but with that other ship. In other words the steamship is only part, although of course the most essential part, of the plant with which the business is to be carried on. By the next clause in the memorandum of association the company are "to carry on the business of shipowners in all its branches with respect to such steamship," that is to say, the steamship first acquired or any other acquired from time to time on the loss, sale, or disposition of the first vessel or of any vessel subsequently acquired. The memorandum of association contains nothing further of importance. The only other material matter is No. 75 (*m*) of the articles of association; that merely deals with the powers of the manager of the company and provides that "he may, in the event of the loss of the said steamship for the time being owned by the company, with the approval of the shareholders in general meeting, buy another steamship by and out of the proceeds of the insurances of the said ship so lost, or he shall divide and pay the net proceeds of such insurances rateably amongst the shareholders in the company and wind the company up." The effect of that article is that upon the loss of the *Merchiston* the company might have been wound up. But it was not in fact wound up. It seems to me that it was

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carrying on one business from beginning to end, and, that being so, the appeal must be allowed.

Appeal allowed.

Solicitors for appellants: *Botterell & Roche, for Botterell, Roche & Temperley, West Hartlepool.*

Solicitor for respondent: *The Solicitor of Inland Revenue.*

W. H. G.

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July 26.

THE KING *v.* ROWLANDS. *Ex parte* BEESLEY.

Local Government — Urban District Council — Chairman — Retirement of Members—Election of new Members — Position of former Chairman—Appointment of new Chairman—Inherent Right to appoint—Chairman absent—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 199 ; *Sched. I., rr.* 3, 5—*Local Government Act*, 1894 (56 *&* 57 *Vict. c.* 73), *ss.* 23, 59.

By s. 199 of the Public Health Act, 1875, every urban authority (not being the council of a borough) is to hold an annual meeting, and meetings of local boards are to be held and conducted in accordance with the rules as to meetings and proceedings contained in Sched. I. to the Act. By r. 3 of those rules every local board shall at their annual meeting appoint one of their number to be chairman for one year at all meetings at which he is present. By r. 5, if the chairman is absent from any meeting, the members present shall appoint one of their number to act as chairman thereat.

By s. 59 of the Local Government Act, 1894, it is enacted that s. 199 and Sched. I. of the Public Health Act, 1875, shall apply in the case of every urban district council (other than a borough council) as if such district council were a local board. By s. 23, sub-s. 6, of the last-mentioned Act it is provided that a county council may in certain circumstances direct that the members of an urban district council shall retire together on April 15 in every third year, and that such order shall have full effect.

The members of an urban district council, in pursuance of an order so made by the county council, retired together on April 15, 1910. New members of the council were elected on April 4, 1910. Among the newly-elected councillors was one who had been on May 4, 1909, appointed chairman of the council composed of the retiring members. At the first meeting of the newly-elected members on April 19, 1910, this member claimed to act as chairman until a new chairman was appointed, on the ground that by r. 3 of the rules in Sched. I. to the Public Health Act, 1875, his appointment as chairman lasted for one

year; and, acting as chairman, he gave a casting vote on the election of a new chairman to the council:—

Held, that the former chairman had no right as such to act as chairman at the meeting of the newly-appointed councillors on April 19, 1910; for that by the order of the county council the former members of the council, including their chairman, retired on April 15; and consequently that the new chairman was not validly appointed.

Held, also, that the proper course for the newly-elected councillors to adopt was to appoint one of their number to act as chairman for the first business of the meeting, including the appointment of a chairman for the year; and that this might be done either in pursuance of the inherent right of a corporation to appoint one of their number to act as chairman, or under and by virtue of r. 5 of the rules in Sched. I. to the Public Health Act, 1875, on the ground that the chairman of the council was absent within the meaning of that rule.

RULE NISI directed to one Joseph Rowlands to shew cause why an information in the nature of a quo warranto should not be exhibited against him to shew by what authority he claimed to exercise the office of chairman of the North Bromsgrove Urban District Council. The grounds of the rule nisi were that one George James was not qualified to act as chairman of a meeting of the council held on April 19, 1910, or in any case to give a casting vote for the said Joseph Rowlands.

By s. 199 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), it is enacted that every urban authority (not being the council of a borough) shall hold an annual meeting. It is further enacted by the same section that meetings of local boards shall be held and the proceedings thereat shall be conducted in accordance with the rules as to meetings and proceedings contained in Sched. I. to the Act. By r. 3 of the rules in Sched. I. to the Act every local board shall from time to time at their annual meeting appoint one of their number to be chairman for one year at all meetings at which he is present.

By r. 4, if the chairman so appointed dies, resigns, or becomes incapable of acting, another member shall be appointed to be chairman for the period during which the person so dying, resigning, or becoming incapable would have been entitled to continue in office, and no longer.

By r. 5, if the chairman is absent from any meeting at the time appointed for holding the same, the members present shall appoint one of their number to act as chairman thereat.

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By s. 23, sub-s. 6, of the Local Government Act, 1894 (56 & 57 Vict. c. 73), the term of office of councillor shall be three years, and one-third, as nearly as may be, of the council shall go out of office on April 15 in each year, and their places shall be filled by the newly-elected councillors. Provided that a county council may on request made by a resolution of an urban district council, passed by two-thirds of the members voting on the resolution, direct that the members of such council shall retire together on April 15 in every third year, and such order shall have full effect.

By s. 59 of the same Act it is provided that s. 199 and Sched. I. of the Public Health Act, 1875, shall apply in the case of every urban district council other than a borough council . . . . as if such district council were a local board, except that the chairman of the council may be elected from outside the councillors.

The following facts appeared from the affidavits:—The North Bromsgrove Urban District Council consisted of twelve members. By an order of the County Council of Worcestershire all the members of the said district council go out of office and have to seek re-election every three years. The last period of office of the late district council expired on April 15, 1910, when, by reason of the order of the county council and of s. 23, sub-s. 6, of the Local Government Act, 1894, all the members retired together.

The new district council was elected on April 4, 1910, when twelve persons, including George James, Joseph Rowlands, and Gerald Beesley, were elected. George James had been appointed chairman of the late district council on May 4, 1909.

The first meeting of the new district council took place on April 19, 1910. At that meeting George James proceeded to take the chair as chairman of the late district council. Gerald Beesley objected to George James taking the chair on the ground that he was not the chairman. George James refused to vacate the chair on the ground that, as the fact was, it had been the practice for the outgoing chairman to take the chair at the annual meeting of the district council until his successor had been appointed. George James then proposed that Joseph Rowlands should be appointed the new chairman. Gerald

Beesley was also proposed as chairman. On the votes being taken six members voted for Gerald Beesley and six against. George James gave a casting vote against Gerald Beesley. Six members voted for Joseph Rowlands and six against, and George James gave a casting vote in favour of Joseph Rowlands, who thereupon took the chair as chairman and acted as chairman for the rest of the meeting, and had since continued to act as chairman of the district council.

A rule nisi having been obtained as aforesaid to question the validity of the appointment of Joseph Rowlands,

McCardie shewed cause. The question is what is meant by the words in r. 3 of the rules in Sched. I. to the Public Health Act, 1875, 'to be chairman for one year." In the case of a district council or a board of guardians there is no provision similar to s. 15, sub-s. 3, of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), in reference to the mayor of a borough council, or s. 3, sub-s. 8, of the Local Government Act, 1894, relating to the chairman of a parish council. The mayor of a borough council and the chairman of a parish council continue in office until their successors respectively take office; but there is no express provision that the chairman of a district council shall continue in office until his successor is appointed. He is simply appointed "chairman for one year." George James was appointed chairman on May 4, 1909. Therefore he continued chairman until May 4, 1910, and consequently was entitled to act as chairman of the meeting of April 19.

[LAWRANCE J. The members of this council retired together on April 15 by order of the county council. Do you contend that George James continued chairman notwithstanding that order ?]

The chairman need not be a member of the council: Local Government Act, 1894, s. 59. He may remain in office although the members of the council retire. The council is a corporation and has an existence independent of the members who compose it. The chairman is an officer of the corporation, and his office is untouched by the fact that the members of the corporation retire. That fact does not affect the existence of the corporation or the status of its officers.

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Willoughby Williams, in support of the rule. The members of the late district council, including their chairman, George James, retired in a body on April 15, 1910, by virtue of s. 23, sub-s. 6, of the Local Government Act, 1894, and the order of the Worcestershire County Council made thereunder. When the new district council, elected on April 4, held their first meeting on April 19 they had no chairman. The proper course for them to adopt would have been to exercise the right inherent in every corporation to appoint one of its members to act as chairman for the purpose of transacting the first matters to be dealt with, among which in the present case would be the election of a chairman for the year. This right is recognized by r. 5 of the rules in Sched. I. to the Public Health Act, 1875; when the chairman is absent the members present are to appoint one of their number to act as chairman. The members of the new council did not do this, and George James acted as chairman without ever having been elected and without any right or authority so to act.

LORD ALVERSTONE C.J. This rule must be made absolute. The question, which is one of some difficulty, arises in this way. An order had been made by the Worcestershire County Council under s. 23, sub-s. 6, of the Local Government Act, 1894, whereby all the members of the North Bromsgrove District Council went out of office on April 15, 1910. Therefore prima facie nobody after that date had any right to enter the council chamber unless he had been elected a member of the new council. Mr. McCardie contended that George James had a right to preside at the meeting on April 19, 1910, by virtue of having been elected chairman of the old council on May 4, 1909; but we are not concerned with the question whether he was a member of the late council; his right to be present depended not upon his having been a member of the old council, but upon his having been elected a member of the new council. But then it is said that he was elected chairman on May 4, 1909, to be chairman for one year under the provisions of r. 3 of the rules in Sched. I. to the Public Health Act, 1875. If that means that he was elected chairman for the calendar year from

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May 4, 1909, to May 4, 1910, he would still have held the office of chairman at this meeting, which took place before May 4, 1910, namely, on April 19. But in my view his tenure of the position of chairman of the council in office on May 4, 1909, depended upon the continuance in office of that council. He was a member of that council not because he was its chairman, but because he had been elected a member of it. It is said that a chairman may be elected from outside the councillors under s. 59 of the Local Government Act, 1894; but Mr. James was not so elected; he remained chairman of the old council just so long as he remained a member of it, and no longer. When the members of that council retired together he retired with the others, and any further right which he had to enter the council chamber was not as a member or as chairman of the old council, but as having been elected a member of the new body. I quite agree that it is a pity that there is no provision in the case of a district council enabling a chairman, like the chairman of a parish council or the mayor of a municipal borough, to continue in his office until his successor takes office, but we cannot invest the chairman of a district council with powers which the Legislature has refrained from conferring upon him simply because we think it would at times be convenient that he should possess those powers. The sounder view is that pointed out by my brother Lawrance, namely, that as the councillors take their office and powers from being elected as councillors, all those powers cease when the persons exercising them cease to be councillors on April 15 in every third year.

Then what course ought to be pursued? Every corporation has prima facie an inherent right to elect a chairman. In the case of this council I think r. 5 of the rules in Sched. I. to the Public Health Act, 1875, is wide enough in its terms to meet the emergency; that rule seems to me to point to a special instance of the general principle that the members of a corporation have a right to elect a chairman. That being so, this council at its meeting on April 19, 1910, ought to have elected a chairman for the business of that day's meeting, one of the first matters to be dealt with being the election of a chairman for the coming year. If they should fail to agree upon a chairman, their failure is not

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sufficient to reinvest the chairman of the former council with powers which he had, but which the Legislature has not seen fit to prolong. Therefore George James had no right to exercise the office of chairman of the North Bromsgrove Urban District Council on April 19, 1910, and this rule must be made absolute.

LAWRANCE J. I am of the same opinion.

DARLING J. I agree, although I think we are taking a step beyond the expressed provisions of the rules in the schedule to the Public Health Act, 1875, in ascribing to this district council a right, analogous to the inherent right of a corporation, to appoint a chairman for that particular meeting on April 19. I think myself that there is a possible interpretation of r. 5 which would confer on the council the power for the moment to appoint a chairman for the purpose of electing a chairman for the year. The words of that rule are "If the chairman is absent from any meeting at the time appointed for holding the same, the members present shall appoint one of their number to act as chairman thereat." Where there is no chairman it may be said that the chairman is absent. It may be that this is a somewhat strained meaning, but it is a possible meaning of the words; at any rate that which does not exist cannot be said to be present. The councillors present at the meeting on April 19 ought to have appointed one of their number to act as chairman at that meeting; the member so appointed would in case of equality of votes have had a casting vote, and in that way all difficulties could have been surmounted.

Rule absolute.

Solicitors for relator: *Long & Gardner, for G. W. Hobson, Droitwich.*

Solicitor for defendant: *H. Percy Becher, for Rowlands & Co., Birmingham.*

W. H. G.

[IN THE COURT OF APPEAL.]

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JACKSON *v.* ROTAX MOTOR AND CYCLE COMPANY.

Sale of Goods—Implied Condition as to Quality or Fitness—Merchantable Quality—Right of Rejection—Form of Contract—Severability—Rejection of later Instalments after Acceptance of earlier Instalment—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 14.

An English dealer ordered from a foreign manufacturer a large number of motor horns of different descriptions and prices, "delivery as required." The horns were delivered in several instalments. The buyer, after accepting the first instalment, rejected the later instalments on the ground that the goods were not of merchantable quality. In an action for the price of the goods the official referee found that a large proportion of the horns were dented and badly polished owing to defective packing and careless workmanship, but that they could easily have been made merchantable at a trifling cost, and he declined to hold that the consignment as a whole was unmerchantable and gave judgment for the seller with an allowance to the buyer in respect of the defective goods; and this judgment was affirmed by the Divisional Court. On appeal:—

Held, (1.) upon the construction of the contract, that the acceptance of the first instalment did not preclude the buyer from rejecting the later instalments; (2.) that the buyer was justified in rejecting the later instalments as unmerchantable.

Appeal from the decision of a Divisional Court (Darling and Bucknill JJ.).

The plaintiff was a manufacturer of motor horns carrying on business in Paris. The defendants carried on business in London as dealers in motor accessories.

The action was brought to recover 450*l.* 6*s.*, the invoice price of nineteen cases of motor horns sold and delivered to the defendants, less 16*l.* 6*s.* 5*d.* paid on account, the plaintiff's net claim being therefore for 433*l.* 19*s.* 7*d.* The substantial defence to the action was that the goods as delivered were not of merchantable quality.

The action was referred to an official referee for trial.

On October 31, 1908, the defendants gave an order to the plaintiff for 600 odd motor horns of slightly varying descriptions and prices as specified in the order. The order also provided as follows: "Delivery as required, usual terms 2½ per cent., franco franco London." At the defendants' request the

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goods were delivered to a particular firm of carriers whom they nominated. The goods were delivered in nineteen cases at various dates in May and June, 1909, the last case having been delivered on June 24. On the same day the defendants inspected the goods, and as the result of the inspection they determined to reject the whole of the horns except those contained in case 2, which they had legally accepted by reason of their having sold them to retail dealers. In giving notice of rejection to the plaintiff the defendants stated as their ground of rejection that a great proportion of the horns were unsaleable on account of their being dented, badly polished, badly finished, and otherwise of faulty manufacture. The plaintiff then commenced this action.

The first delivery comprised cases 1 to 4, and the defendants before action brought paid the plaintiff 16*l.* 6*s.* 5*d.* in respect of case 2 which they had accepted. They also paid into Court with their defence, with a denial of liability, the sum of 65*l.* 16*s.* 10*d.*, being the invoice price of the contents of cases 1, 3, and 4, and as a defence to the action they relied upon their right to reject the cases other than case 2, or, alternatively, other than cases 1, 2, 3, 4, mainly on the ground that the goods were not merchantable, but partly also on the ground that the goods were delivered to the defendants mixed with goods of a different description from that ordered. The defendants also counter-claimed for damages in so far as they might be held bound to accept the goods.

In the defendants' particulars 364 horns out of a total of 609 were stated to be defective. There were three main causes of complaint—(1.) that the bell parts of the horn were dented and scratched; (2.) that the tubes were discoloured and were badly finished and polished; (3.) that twelve of the horns were not of the pattern ordered. At the trial the plaintiff offered to exchange the twelve horns sent by mistake.

The official referee, in giving judgment, said that, inasmuch as the goods were delivered to carriers named by the buyers, delivery to those carriers was prima facie delivery to the buyers; that in the circumstances of the case there was an implied condition that the goods when delivered to the carriers should be

merchantable and fit for the purposes for which they were required; that on delivery of the goods to the carriers the property in them passed to the buyers, if they were in accordance with the contract, so as to cast on the buyers the usual risks of ownership, but that the buyers had a right to reject the goods if on arrival it turned out that as despatched they were unmerchantable; and that one of the buyers' risks was that there might be some deterioration arising in transit. He then found the facts as follows: "The motor horns consist of in the main three parts, the bell, which is of brass or nickel, a bulb of india-rubber, and one or two tubes connecting the bulb with the bell. The complaints arose chiefly in regard to the bells and the tubes. The chief complaint as to the bells was that the metal was dented or otherwise injured, the injuries being attributed mainly to defective packing. It was said that some of the injuries were irremediable. Speaking of the deliveries as a whole this complaint has not been established. I find that as regards the bells, the horns were substantially in accordance with the contract, when despatched. They sustained injuries in transit partly due to the packing having in some instances been insufficient; but as was shewn by a practical experiment made during the trial, most if not all of the horns thus dented or injured could have been at very slight cost made merchantable. As regards the tubes, some arrived in a condition which required polishing or other work to make them merchantable, and in a few there may have been some careless work. But reviewing the evidence as a whole I cannot find that the goods as an entire consignment were unmerchantable so as to justify rejection. In respect of the injuries due to defective packing and careless or ineffective manufacture, the defendants are in my opinion entitled to an allowance the amount of which I assess at 35*l.*" The official referee accordingly held that the plaintiff was entitled to recover 398*l.* 19*s.* 7*d.*, and, there having been paid into Court 65*l.* 16*s.* 10*d.*, gave judgment for the plaintiff for 333*l.* 2*s.* 9*d.* together with the costs of the action and of the counter-claim.

The defendants appealed. The Divisional Court dismissed the appeal without costs. Darling J. was of opinion that the words "merchantable quality" in the Sale of Goods Act were not

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equivalent to immediately saleable. He did not think that goods were not of merchantable quality if they wanted some trifling thing done to them to make them immediately saleable. Read in its entirety the judgment of the official referee meant that these goods were of merchantable quality although to make them immediately saleable at the price which they were expected to fetch they required some little thing to be done to them which could be done at a trifling expense. He (Darling J.) thought it was perfectly competent to the Court to say that the contract must stand, but that something should be allowed to the buyers because of the expense to which they had been put to make the goods immediately saleable.

The defendants appealed, and there was a cross-notice of appeal by the plaintiff as to the costs.

Clavell Salter, K.C. (*H. M. Giveen* with him), for the appellants. Under the English law, before the seller can sue for the price of goods sold and delivered he must perform his contract, and, in the absence of any special stipulation as to a rebate, all the goods supplied must be of merchantable quality, subject only to the rule de minimis; and if he fails to tender goods of merchantable quality it is open to the buyer to reject the consignment. The official referee has treated this as one entire contract for the whole of the goods and has held that the defendants must pay the contract price subject to an allowance. There are three possible views of this transaction—first, that it is an entire contract; secondly, that there is a separate contract as to each consignment; thirdly, that there is a separate contract as to each horn. Having regard to the words in the order "Delivery as required" it is submitted that the second construction is the correct one: *Simpson* v. *Crippin* (1); *Reuter* v. *Sala* (2); and, on that hypothesis, the acceptance by the buyer of one consignment is not a waiver of his right to reject the later consignments: *Tarling* v. *O'Riordan*. (3) On no view of the law can the buyer be ordered to pay or the seller to accept something less than the contract price, because that is making a new contract for the

(1) (1872) L. R. 8 Q. B. 14. (2) (1879) 4 C. P. D. 239, 246.
(3) (1878) 2 L. R. Ir. 82.

parties: *Hooper & Co.* v. *Balfour, Williamson & Co.* (1); *In re an Arbitration between Green & Co. and Balfour, Williamson & Co.* (2) The fallacy of the official referee's judgment is that he treats the breach of the implied condition as to merchantability as if it were a warranty. It is because the defect in merchantability in this case, though affecting a large proportion of the goods, is comparatively slight in the total amount, that the official referee and the Divisional Court have endeavoured to hold the defendants to their contract; but the result of upholding their decisions would be to create a very dangerous precedent. Further, it is admitted that twelve of the horns were not of the right pattern, and under s. 30 of the Sale of Goods Act, 1893, that alone would be a sufficient ground of rejection, inasmuch as the goods were mixed with other goods which the defendants were not bound to take: *Levy* v. *Green.* (3) In the Divisional Court Darling J. attempted to draw a distinction, for which there is no foundation, between "merchantable" and "immediately saleable"; the two things are the same.

Frank Newbolt (*Tindal Atkinson, K.C.*, with him), for the respondent. There is no statutory definition of merchantability, but assuming that it means immediately saleable, there was uncontradicted evidence that these horns were saleable on arrival. Whether goods are merchantable or not is a question of fact which depends upon all the circumstances. Goods are not unmerchantable because an allowance has to be made: "merchantable with allowance" is a common commercial expression. To examine each article separately is not the true test of what is meant by "immediately saleable" as applied to a consignment, for the whole consignment may, as here, be immediately saleable with all faults, whereas the first ten or even one hundred horns examined might not be separately saleable to a retail customer.

Levy v. *Green* (3) does not apply: the twelve delivered of the wrong description were within the rule de minimis, and after the plaintiff had offered to exchange them before the referee the point was dropped. The property in all the horns passed

(1) (1890) 62 L. T. 646. (2) (1890) 63 L. T. 97.
(3) (1859) 1 E. & E. 969.

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to the purchaser on delivery to a carrier named by him: *Fragano* v. *Long* (1); Sale of Goods Act, 1893, s. 32. The goods were merchantable when put on board, and there was no evidence to shew how the damage occurred. The horns were reasonably fit for the purpose for which they were supplied: *Jones* v. *Just* (2); and the allowance made by the referee was ample for any possible breach of warranty, such as that the goods sold should be carefully packed. The buyer took the risk of deterioration in transit, and the defects complained of were so slight and so easily remedied that they could not affect the merchantability of the whole consignment.

The respondent does not dispute the correctness of *Tarling* v. *O'Riordan* (3), but the goods rejected there were different in kind and were never covered by the contract.

COZENS-HARDY M.R. This appeal, which has been very fully and carefully argued on behalf of the respondent, raises a question of some difficulty. The plaintiff is a manufacturer of motor horns in Paris. The defendants are a company in this country who sell motor accessories, including horns. In October, 1908, they gave an order to the plaintiff for a large number of horns of different sizes and of different prices. The material part of this was "Delivery as required, usual terms 2½ per cent., franco franco London." Then it contains a large number of horns of different descriptions and different prices. As a matter of construction of that order it seems to me that it clearly contemplated not one entire contract for the sale at a lump price of an entire number of goods, but deliveries from time to time as required, with this result, that it was no answer to the buyers' claim to reject to say "You cannot reject the later deliveries because you have accepted delivery of a prior instalment which was up to the mark and which you could not reject." When the last instalment was delivered the plaintiff, as appears from the correspondence, asserted that there had been a complete performance of the contract to deliver the horns which the defendants required. The defendants on the other

(1) (1825) 4 B. & C. 219. (2) (1868) L. R. 3 Q. B. 197.
(3) 2 L. R. Ir. 82.

hand took up the position that there had been no complete performance of the contract by the plaintiff on the ground that some of the goods were not of merchantable quality. The plaintiff then commenced this action for the price of the goods, and it has been fought out before the official referee on that issue. The case made out before the official referee was that a very considerable portion of the horns delivered in London were dented and damaged in various ways, and that that damaged state was partly due to the bad packing by the plaintiff in Paris and partly to injury sustained by the transit by rail and sea, the goods having, I should say, been delivered by the plaintiff to carriers nominated by the defendants. The official referee has found not merely that the horns were damaged in transit, but that owing to defective packing many of the horns as delivered were not in a merchantable state in the sense that they could without more have been disposed of reasonably and properly by the buyers as dealers in horns to any customer who wanted then and there a horn for a motor car, but that in order to make them merchantable they required to be polished and otherwise dealt with at a cost which he said would have been trifling.

I will read a passage from his judgment. [The Master of the Rolls read the passage set out in the statement of facts, and proceeded.] What does that amount to? The plaintiff is suing for the contract price of the goods and the official referee has held the defendants bound to take the goods, part of which were, as the official referee finds, unmerchantable, with an allowance of 35*l*. The case then went to the Divisional Court, and the Divisional Court put what so far as I am aware is an entirely new meaning on the word "merchantable," namely, that goods are "merchantable" if they only want some trifling thing done to make them immediately saleable—that they are to be considered as merchantable, although not immediately saleable, and although a further expenditure of money is required by the purchaser to make them saleable. I am not aware of any authority for that view. It seems to me to be inconsistent with the language of the Sale of Goods Act to which our attention has been called. It is certainly inconsistent with the view taken by the Court of Appeal in Ireland in the important case of

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Tarling v. *O'Riordan* (1), which is so like the present case that I think it is worth while considering it a little in detail. There the defendant gave to the plaintiff a joint order for a quantity of ready-made clothing consisting of various particulars. No time was mentioned for delivery, but the inference which the Court drew was that the goods were to be delivered not at one time but in different parcels. Now that is an inference which I have no hesitation in drawing in the present case, because the words at the head of this order "Delivery as required" plainly shew that it was not in the contemplation of either party that the large number of horns comprised in this order should be delivered at one time, but that there should be separate deliveries, separate instalments if you like, as and when required by the buyers. It is, in fact, very like the case of *Simpson* v. *Crippin* (2), which Thesiger L.J. referred to in *Reuter* v. *Sala* (3), where each instalment, or each consignment, was really a delivery under a separate contract. In the Irish case, the Court having arrived at the inference that the parties intended separate deliveries and not one delivery under one entire contract, this happened. One bale was sent which was complete in accordance with the contract, and which the buyer did not reject for the best possible reason, namely, that he could not reject it. Ten days afterwards there was a second delivery of goods under, or alleged to be under, the contract. That second bale of goods contained articles which were not in accordance with the contract, and which the Court held would, apart from the delivery of the first bale, clearly entitle the buyer to reject, and I think the case cannot be put better than it was put by Morris C.J. in the following passage:—"The defendant here accepted the first bale, and used it finding it was correct. At the time he so accepted it he could not contemplate that the remaining goods would not be sent also correctly. In my opinion the defendant was only bound to pay for the bale that was correct and accepted by him in part performance of his contract, and was not bound to pay for any portion of the second bale which he was not bound to accept." Here the fact that the buyers have accepted the first consignment seems to me to have

(1) 2 L. R. Ir. 82. (2) L. R. 8 Q. B. 14.
(3) 4 C. P. D. 239, at p. 246.

no bearing at all upon their right to reject, if they have a right to reject, the goods which were delivered in pursuance of later requirements. Now had they a right to reject? It seems to me plain on the face of the finding of the official referee, which I see no reason to doubt, that they had a right to reject. The goods were not in accordance with the contract. They were not merchantable. It is true that a large proportion of the goods were merchantable, but that does not justify an action by the vendor for the price of the goods unless he can prove that he was ready and willing to deliver and had delivered or had tendered all the goods in a merchantable condition and of the quality required, subject, of course, to the qualification, if it be necessary to mention it, that the law does not regard as an exception that to which the rule of de minimis can apply; but, subject only to that qualification, it is for the vendor in a case like this to prove that he has delivered or has tendered delivery of goods which were in accordance with the contract.

For these reasons it seems to me that the decisions of the official referee and the Divisional Court were wrong and that this appeal ought to be allowed and judgment entered for the defendants.

FARWELL L.J. I am of the same opinion. The point is an interesting one, and I am grateful to counsel on both sides for the assistance they have given me in arriving at a conclusion. The first question is one of fact. The official referee has found that both the tubes and the horns were in fact unmerchantable, but that the goods as an entire consignment were not unmerchantable. That requires a little consideration. Of the tubes in question more than half were defective, and of the horns also a very considerable number were defective, so that a very large number of the aggregate were in fact unmerchantable. It may well be that in the case of a single horn out of hundreds or a tube or two out of hundreds the rule de minimis would apply, and it would be open to the jury, or to the official referee, to find that, notwithstanding the fact that one or two items were unmerchantable, the consignment as a whole, treating the contract as for a consignment, was merchantable;

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but the official referee has not taken that view, and, as I understand his finding, I think it is untenable. "True it is," he says, "that I find that each individual horn of, say, half the consignment is unmerchantable, so that the purchasers could not be compelled to take it, but I do not find that the amount of injury or bad workmanship or the like is sufficient to make it very unmerchantable, and therefore, if one half only of the horns comprising the consignment are unmerchantable, I think the buyers must take the whole." In my opinion that is not what is meant by "merchantable" as applied to a consignment. If the individual horns are to any appreciable extent unmerchantable, it is not open to the official referee or any one else to say "Although you would not be bound to take one horn because it does not answer the description of being merchantable, still you must take the whole because more than half are merchantable." I do not think that is the meaning of de minimis, and on no other ground do I see how it is possible to hold that a consignment can be merchantable when the individual articles making it up, or a large number of them, are not merchantable. I find therefore on the facts before me that the articles are unmerchantable.

Then the next question is, What is the meaning of the contract? If it be an entire contract, then, inasmuch as in this case in May, 1909, deliveries were taken and paid for and the goods delivered passed out of the purchasers' hands by being sold to retail dealers, there is no possibility of rejection of the articles ultimately delivered, because the purchasers have under s. 35 of the Sale of Goods Act, 1893, accepted and dealt with the earlier consignments. But that very consideration makes it impossible to my mind to regard this as an entire contract. In Benjamin on Sale, 5th ed., p. 696, it is said, "If the contract be an entire contract for a specified quantity to be delivered in parcels from time to time, the buyer may return the parcels first received, if the later deliveries be not made, for the contract is not performed by the seller's delivery of less than the whole quantity sold." Now, reading this as a contract in which the deliveries are to be made from time to time as and when required by the purchasers, to be paid for

with a discount allowance (which implies that the goods were intended to be paid for on delivery), I find it impossible to suppose that the parties were intending this to be an entire contract with all the consequences which would follow. So long as the goods had not been sold or parted with, I think the principles laid down by Lord Esher in the case of *Reuter* v. *Sala* (1) apply. He says (2): "It seems to me that the general principle to be deduced from these cases" (*Simpson* v. *Crippin* (3) and *Jonassohn* v. *Young* (4)) "is, that where in a mercantile contract of purchase and sale of goods to be delivered and accepted the terms of the contract allow the delivery to be by successive deliveries, the failure of the seller or buyer to fulfil his part in any one or more of those deliveries does not absolve the other party from the duty of tendering or accepting in the case of other subsequent deliveries, although the contract was for the purchase and sale of a specified quantity of goods, and although the failure of the party suing as to one or more deliveries was incurable in the sense that he never could fulfil his undertaking to accept or deliver the whole of the specified quantity. The reasons given are that such a breach by the party suing is a breach of only a part of the consideration moving from him; that such a breach can be compensated in damages without any necessity for annulling the whole contract; that the true construction of such contracts is that it is not a condition precedent to the obligation to tender or accept a part, that the other party should have been or should be always ready and willing and able to accept or tender the whole. A consideration of the mercantile consequences of otherwise construing such contracts seems to me to fortify the one construction and to condemn the other." Then he goes on to give instances. It is true that he was the dissentient judge in that case, but the question was one of the construction of a contract and the decision of the Court was that it was an entire contract and does not affect the Lord Justice's reasoning. The principle appears to me admirable and certainly not inconsistent with the judgment of Thesiger L.J. in the passage already referred to by the Master of the Rolls—

(1) 4 C. P. D. 239.
(2) 4 C. P. D. at p. 256
(3) L. R. 8 Q. B. 14.
(4) (1863) 4 B. & S. 296.

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I mean the passage containing the reference to the case of *Simpson* v. *Crippin* (1) where Blackburn J. proceeded on very much the same principle. There there was a contract to supply 6000 to 8000 tons of coal to be delivered into the plaintiffs' waggons at the defendants' collieries in equal monthly instalments during the period of twelve months at 5*s*. 6*d*. per ton. During the first month the plaintiffs sent waggons to receive only 158 tons. Immediately after the first month had expired, the defendants informed the plaintiffs that, as the plaintiffs had taken only 158 tons, the defendants would annul the contract. The plaintiffs refused to allow the contract to be annulled, but the defendants declined to deliver any more coal. It was held that the breach by the plaintiffs in taking less than the stipulated quantity during the first month did not entitle the defendants to rescind the contract. That is put by Thesiger L.J. as being on the basis that each delivery of coal was required to be delivered under a separate contract and to be paid for separately. That is, in my opinion, the construction of this contract.

There is a third possible construction, that (inasmuch as the price is so much per horn) it is a contract consisting of several hundreds of contracts, one for each horn. I do not think that is the true construction of the contract, although it is true that the purchasers might have required the delivery of a single horn if they liked. I think the true construction of "as and when required" is as each batch is required, and that each batch as and when required becomes the subject of a separate contract. That being so, there is in this case a batch consigned which contains articles some of which were not ordered at all, inasmuch as they were not of the right pattern, and some of which were defective. To that state of things the ruling of Willes J. in the Exchequer Chamber in the case of *Levy* v. *Green* (2) applies and the purchasers are entitled to refuse the whole of that batch.

For these reasons I am unable to take the same view as has been taken in the Divisional Court, where Darling J. has invented a novel meaning of the word "merchantable."

(1) L. R. 8 Q. B. 14. (2) 1 E. & E. 969, at p. 974.

KENNEDY L.J. I agree. The case has been so fully dealt with by the Master of the Rolls and Farwell L.J. that I shall only add a few words. It seems to me impossible to say from the way in which this transaction has been carried out by the parties that it was intended to be treated as one entire contract so that the acceptance of an earlier instalment would preclude the buyers from rejecting a later instalment. Also for the purposes of this case, as it has been dealt with, I do not think that this can be treated as a sale of so many individual horns, although possibly it might have been so treated by the parties. In fact I think the natural inference is that this transaction is to be treated, as stated by Farwell L.J., on the footing of there being a separate contract for each delivery. It cannot matter whether the bales are large or small—the goods of course must come in some form of package—but I think it is part of the right of the buyer, if each consignment is to be treated as forming the subject of a separate contract, that all the goods comprised in that consignment should be of merchantable quality, as prescribed by sub-s. 2 of s. 14 of the Act, subject only to this, that in proportion to the size of the consignment (to use the words the parties have used) there may be so small and insignificant a portion defective as to come within the rule which the Master of the Rolls has referred to as the rule de minimis. I think it is quite clear that that was not the case here. There was here a substantial failure on the part of the seller to deliver goods of a merchantable quality, and subject to the one qualification of the rule of insignificance, if I may so call it, the buyers were entitled to treat this as one contract and to reject the goods. They were not bound to go picking and choosing. The seller cannot say "Pick out the various portions which are good and pay for those," though I cannot help thinking that, if the seller had acted reasonably in this case, the buyers might have been willing to take some of the horns and return the others; but the action has been brought in respect of the whole consignment, and the right to reject any of this unmerchantable portion has been challenged. The official referee refused to recognize the right of the buyers to reject on the ground that a portion of the goods was unmerchantable notwithstanding that he has found that (quite apart

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from any question of damage in transit) a portion was unmerchantable. I cannot accept that. I also have a difficulty in appreciating the language used in the Divisional Court, where a distinction is drawn between goods which are of unmerchantable quality within the Act of Parliament and goods which by reason of being damaged cannot be honestly sold at the time as merchantable goods, but which can be made saleable if some labour is spent upon them. I do not think we can treat "merchantable quality" as meaning something which can be made merchantable—it is something which is merchantable at the time when the tender is made by the seller.

The Irish case of *Tarling* v. *O'Riordan* (1) seems to me to be in point. There there was a quantity of tailors' goods to be sold. No form of package was prescribed by the contract. The first consignment was properly packed in one bale and was all in order. The second was not, and the Court there held that it was (in the circumstances of the second delivery being in part unmerchantable and in part not according to contract) one which the buyer could not be forced to take. In conclusion Morris C.J. said: "The defendant here accepted the first bale and used it finding it was correct; at the time he so accepted it he could not contemplate that the remaining goods would not be sent also correctly. In my opinion the defendant was only bound to pay for the bale that was correct and accepted by him in part performance of his contract and was not bound to pay for any portion of the second bale which he was not bound to accept." That is this case if you substitute for the word "bale" consignment. I think, therefore, that this Court must come to the conclusion that the case has not been rightly dealt with by the official referee or the Court below.

A discussion ensued upon the form of the order, and it was then agreed that the plaintiff should keep the 65*l.* 16*s.* 10*d.* which had been paid into Court and that the defendants should accept cases 1, 3, and 4. Thereupon the Court ordered that the appeal should be allowed with costs and the cross-appeal dismissed with costs and judgment entered for the defendants

(1) 2 L. R. Ir. 82.

with costs from the date of the payment in; no costs up to that date.

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Appeal allowed.
Cross-appeal dismissed.

Solicitor for appellants: *Arthur S. Joseph.*
Solicitors for respondent: *Carter & Bell.*

H. B. H.

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June 22, 23.

Local Government—Costs of unsuccessful Prosecutions—Borough having separate Commission of the Peace—No separate Court of Quarter Sessions—Prosecutions before Borough Justices—Justices Clerks Act, 1877 (40 & 41 *Vict. c.* 43), *s.* 6—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 140; *Sched. V., Part II.*

A borough with a population exceeding 10,000 had a separate commission of the peace with a justices' clerk, but not a separate Court of quarter sessions. It had the right to provide and pay for its own police, but by agreement the borough was for police purposes consolidated with the county, and the county supplied the police for which the borough paid. The county rate was leviable in the borough:—

Held, that the costs of prosecutions undertaken by the police before the borough justices in cases in which such costs were not remitted or were not paid by the parties chargeable were chargeable to the borough fund and not to the funds of the county in which the borough was situate.

FURTHER CONSIDERATION of an action tried before Scrutton J. without a jury at the Pembroke Assizes.

The statement of claim was as follows:—

"1. The plaintiff is the clerk to the county council for the county of Pembroke; the defendant is the clerk to the justices for the petty sessional division of the borough of Pembroke.

"2. The said borough of Pembroke is a borough having a population exceeding 10,000 with a commission of the peace separate from the commission of the peace for the county of Pembroke, but having no separate Court of quarter sessions.

"3. By a memorandum of agreement entered into on the 7th September, 1858, between Her Majesty's justices of the peace

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for the county of Pembroke of the one part and the mayor, aldermen, and burgesses of the borough of Pembroke of the other part it was agreed that for the purposes of police the borough of Pembroke should be consolidated with the county of Pembroke pursuant to the County Police Act, 1840 (3 & 4 Vict. c. 88), s. 14, and that the police rate to be paid by the borough of Pembroke for the number of constables thereby agreed to be provided should be equal to the rate paid by the said county of Pembroke.

"4. Since the date of the said agreement the duties of the police within the said borough of Pembroke have been wholly discharged by the police provided by the said county of Pembroke, and summonses are and have been taken out by the police returnable before the justices for the borough of Pembroke, and are from time to time issued by the defendant.

"5. The defendant's salary as clerk to the said justices for the borough of Pembroke is paid from the borough fund of the borough of Pembroke.

"6. The defendant has from time to time paid over to the treasurer of the borough of Pembroke such fees as were payable to him as clerk of the justices aforesaid, and has further paid over unappropriated fines, fees, and penalties arising out of any cause or matter determined before the said justices for the borough of Pembroke, and has deducted and claims to deduct certain sums for the cost of summonses taken out by the police where such sums are not recovered from the party proceeded against from the total sum due and payable by him to the treasurer of the said county of Pembroke.

"7. In or about the month of February, 1909, the county council of Pembrokeshire, being the authority empowered to appoint the treasurer for the said county of Pembroke, required of the defendant that he should transmit to John Woodrow Cross, being the treasurer of the county aforesaid, in the form and manner provided by rule 6 of the Summary Jurisdiction Rules and Form 2 of Part III. of the schedule annexed thereto an account for the years 1903, 1904, 1905, 1906, 1907, and 1908 of all fines, fees, or other sums imposed or received in instalments thereof, shewing their appropriation and the sums payable to

the said treasurer, and to forward with the said account a remittance for the amounts payable to the said treasurer.

"8. The defendant has failed to transmit to the said John Woodrow Cross any account for the years 1903, 1904, 1905, 1906, 1907, and 1908 in the form required or at all, and has been guilty of breaches of the statutory duty imposed upon him by the Act of Parliament aforesaid thereby, and the plaintiff claims to be entitled to such penalties as may be found to be due from the defendant for such breaches.

"9. The defendant has rendered two statements of account bearing date March 31, 1909, and June 30, 1909, respectively in the form aforesaid, but has failed to remit such sums as are shewn upon the accounts referred to to be due and payable to the said treasurer.

"10. The account bearing date March 31, 1909, sets out the sum of 18*l.* 8*s.* 10½*d.* as being the total of the fines, fees, and other sums payable to the treasurer of the county of Pembroke. The sum of 10*l.* 12*s.* 6*d.* has been deducted by the defendant and has been claimed by him as being a sum payable to the borough of Pembroke, and the sum of 7*l.* 16*s.* 4½*d.* being the balance after the deduction aforesaid has been remitted to the said treasurer, and the defendant has failed to pay over and refuses to pay over the sum of 10*l.* 12*s.* 6*d.* due and payable to the treasurer aforesaid.

"11. The account bearing date June 30, 1909, sets out the sum of 17*l.* 12*s.* 10½*d.* as being the sum payable to the treasurer of the county of Pembroke. The sum of 10*l.* 0*s.* 6*d.* has been deducted by the defendant and has been claimed by him as being a sum payable to the borough of Pembroke, and the sum of 7*l.* 12*s.* 4½*d.* being the balance after the deduction aforesaid has been remitted to the said treasurer, and the defendant has failed to pay over and refuses to pay over the sum of 10*l.* 0*s.* 6*d.* due and payable to the treasurer aforesaid.

"12. By reason of the premises the defendant has committed a breach of the statutory duty imposed on him by s. 6 of the Justices Clerks Act, 1877 (40 & 41 Vict. c. 43), as clerk to the justices for the petty sessional division of the borough of Pembroke to pay over the sums aforesaid to the treasurer of the

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place for which such justices acted, to wit, the county of Pembroke, after being so directed by the county council for the county of Pembroke, who appointed such treasurer, and the plaintiff claims to be entitled to such penalties as may be due from the defendant for his wilful omission to pay over the sums aforesaid."

At the trial by leave of the Court and by agreement of the parties, who desired, not to recover penalties, but to obtain the opinion of the Court upon the various questions at issue between them, the statement of claim was amended by adding the following paragraph:—

"13. The plaintiff claims—

"(1.) A declaration that the fines not otherwise appropriated (payable by and now in the hands of the treasurer of the borough of Pembroke) are payable to the treasurer of the county of Pembroke.

"(2.) A further declaration that the defendant should transmit to John Woodrow Cross as treasurer of the county of Pembroke accounts as claimed in paragraph 7 hereof.

"(3.) A further declaration that the costs of prosecutions undertaken by the police before the justices for the borough of Pembroke in cases in which such costs are not remitted or are not paid by the parties chargeable are not chargeable to the funds of the county of Pembroke."

The defence was as follows:—

"1. Paragraphs 1, 2, 4, and 5 of the statement of claim are admitted.

"2. The making of the memorandum of agreement referred to in paragraph 3 of the statement of claim is admitted, but the defendant says that the same is not sufficiently set forth therein and will refer to the same at the trial of the action.

"3. As to paragraph 6 of the statement of claim the defendant admits that he has paid over to the treasurer of the borough of Pembroke such fees as were payable to the said treasurer of the said borough and received by the defendant as clerk to the justices of the said borough, but says that he has not received certain fees due from the police as prosecutors in cases dealt with by the said justices under the Summary

Jurisdiction Acts and amounting to the said sums of 10*l.* 12*s.* 6*d.* and 10*l.* 0*s.* 6*d.*, and has not paid over such amounts which are payable out of the county fund of the county of Pembroke and/or in any event are sums which the defendant is entitled to deduct and/or retain for the said borough of Pembroke.

"4. Further as to paragraph 6 of the statement of claim, the defendant says that he is entitled to deduct from the sums (if any) payable by him to the treasurer of the said county costs of summonses taken out by the police and not paid to him by the police nor recovered from the party proceeded against and/or to retain such sums if received.

"5. The defendant does not admit paragraph 7 of the statement of claim.

"6. The defendant denies that he has failed to transmit to the said John Woodrow Cross the accounts mentioned in paragraph 8 of the statement of claim, and denies that he has been guilty of any breach of any statutory duty imposed on him as alleged or at all. The defendant denies that any penalties are due from him to the plaintiff or at all for the breaches alleged or at all.

"7. The defendant rendered the statements of account dated respectively March 31 and June 30, 1909. The said account of March 31 shews 7*l.* 16*s.* 4½*d.* as payable to the treasurer of the said county, and not 18*l.* 8*s.* 10½*d.* as alleged in paragraph 10 of the statement of claim, and the account dated June 30, 1909, shews 8*l.* 12*s.* 4½*d.* payable as aforesaid, and not the sum of 17*l.* 12*s.* 10½*d.* as alleged in paragraph 11 of the statement of claim. The said sums of 7*l.* 16*s.* 4½*d.* and 8*l.* 12*s.* 4½*d.* are the only sums payable and have been duly remitted by the defendant to the treasurer of the said county.

"8. The defendant denies that he has committed any of the breaches of the statute alleged in paragraph 12 of the statement of claim, or that the plaintiff is entitled to any penalties in respect thereof or at all.

"9. The defendant will rely upon the Public Authorities Protection Act, 1893, and will further contend that the statement of claim discloses no cause of action.

"10. Further and in the alternative if there has been any

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failure or omission to account for or pay over any sums, such failure or omission was not wilful."

The following additional paragraph was allowed at the trial as an amendment:—

"11. As to the declarations claimed by the plaintiff, the defendant denies that the plaintiff is entitled to the same or any part thereof."

The borough of Pembroke as an ancient borough had the right of appointing and paying for its own police; and by the memorandum of agreement referred to in paragraph 3 of the statement of claim it was agreed between the justices for the county and the council of the borough of Pembroke, in addition to the terms mentioned in paragraph 3, that the number of constables to be located in and acting for the borough of Pembroke should consist of one first class constable and six second class constables (1); and that, if any additional number of constables should be required in and for the borough by the Government Inspector of Police or other lawful authority, such additional constables should be provided and borne by and at the expense of the borough exclusively. It was further agreed that the appointment and management of the police of the borough should be vested in the chief constable of the county. It appeared that there had been no watch committee in the borough of Pembroke for thirty years, and that the origination of prosecutions in the borough was undertaken by the police superintendent of the district of the county in which the borough was situate, or by a sergeant under him. The services of the superintendent were not expressly paid for by the borough, but the sergeant was one of the police paid for.

The following admissions of fact were made for the purpose of the action:—(1.) The defendant had been clerk to the justices for six years. (2.) Until the two accounts of March 31 and June 30, 1909, were furnished, no account had been sent by the justices' clerk to the county treasurer. No specific direction was ever given to him as to the times and manner in which he should account for and pay over penalties until October, 1909. (3.) There was at the commencement of the action in the hands of the

(1) The number of constables was subsequently increased.

borough treasurer a sum of money made up of unappropriated fines and penalties, some of which fines were received more than six months before the issue of the writ. (4.) The borough was not a quarter sessions borough. (5.) The county rate, including the police rate, was levied in the borough.

It was agreed that the question raised under the Public Authorities Protection Act, 1893, should be reserved for future argument, if necessary.

June 22. *J. Sankey, K.C.*, and *R. E. L. Vaughan Williams*, for the defendant. It is admitted upon the authorities dealing with similar words in other Acts that the words in s. 6 of the Justices Clerks Act, 1877, "borough or place," are to be construed as ejusdem generis with the preceding words, "county, riding, division," and mean a borough or place which has a separate Court of quarter sessions: *Reg.* v. *Dale* (1); *Mayor, &c., of Reigate* v. *Hart* (2); *Winn* v. *Mossman* (3); *Reg.* v. *West Riding Justices* (4); *Rex* v. *Warwickshire Justices* (5); and that therefore the unappropriated fines imposed by the borough justices are payable to the treasurer of the county. It is also admitted that the defendant is not entitled to deduct from the sums payable by him to the treasurer of the county the costs of summonses taken out by the police before the borough justices and not paid for by the police nor recovered from the party proceeded against: *Wray* v. *Chapman*. (6) It is therefore admitted that the plaintiff is entitled to the first two declarations claimed in the statement of claim as amended. The plaintiff, however, is not entitled to the third declaration claimed, and the costs of prosecutions undertaken by the police before the borough justices are chargeable to the county. The expense of administering justice in a county is a county matter, and, apart from any possible statutory exceptions, the county must bear the costs of prosecutions. The borough of Pembroke is part of the county, and the county must pay the costs of

(1) (1853) Dears. C. C. 37; 22 L. J. (M.C.) 44.
(2) (1868) L. R. 3 Q. B. 244.
(3) (1869) L. R. 4 Ex. 292.
(4) [1900] 1 Q. B. 291.
(5) [1902] 2 K. B. 101.
(6) (1850) 14 Q. B. 742.

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prosecutions. The special provisions as to the costs of prosecutions in boroughs having a separate Court of quarter sessions contained in ss. 151 and 169 of the Municipal Corporations Act, 1882, and in s. 35, sub-s. 5, and s. 100 of the Local Government Act, 1888 (51 & 52 Vict. c. 41), have been repealed by s. 10 of the Costs in Criminal Cases Act, 1908 (8 Edw. 7, c. 15), and the effect of s. 4, sub-s. 1, is that the costs in the case of offences committed or supposed to have been committed elsewhere than in a county borough are payable out of the county fund of the administrative county in which the offence is committed or supposed to have been committed. Quarter sessions boroughs, with the exception of county boroughs, are thus placed upon the same footing in this respect as non-quarter sessions boroughs. The Local Government Act, 1888, deals with the various classes of boroughs. Sects. 31—34 deal with county boroughs; s. 35 deals with a quarter sessions borough which is not a county borough and which had in 1881 a population of 10,000 or upwards. Those sections deal specifically with the costs of assizes and quarter sessions. Sect. 36 applies generally to boroughs, not being county boroughs, which have a separate commission of the peace, whether they have or have not a separate Court of quarter sessions. It therefore applies to the present case. That section applies to administrative matters only, and does not deal with costs, shewing that it was not necessary to deal with the costs of prosecutions which are to be borne by the county. The same appears in s. 38, which applies to quarter sessions boroughs with a population in 1881 of less than 10,000, and in s. 39, which applies to boroughs with a similar population, whether with or without a separate Court of quarter sessions. The borough of Pembroke contributes to the county rate, and the costs of prosecutions must come out of the county fund. The borough has no separate Court of quarter sessions, and, though it has a separate commission of the peace, the borough justices, when they impose penalties in the exercise of their summary jurisdiction, act for the county: *Winn* v. *Mossman*. (1) Inasmuch as the penalties imposed by the borough justices go to the county fund, that fund must bear

(1) L. R. 4 Ex. 292.

the costs of prosecutions where the costs are not paid by the persons charged. The burden and the benefit should go together. That was pointed out in *Reg.* v. *Dale* (1), *Mayor, &c., of Reigate* v. *Hart* (2), and *Reg.* v. *West Riding Justices.* (3) The borough does not direct the prosecutions; that is done by the district superintendent of the county police or by a police officer under him. It is unreasonable that the borough should contribute to the county rate, out of which the costs of prosecutions are paid, and in addition pay for its own prosecutions. The costs, therefore, of prosecutions undertaken by the police before the borough justices in cases where such costs are not remitted or are not paid by the parties chargeable ought to be paid out of the county fund. [*Reg.* v. *Mayor, &c., of Gloucester* (4) and *Thetford Corporation* v. *Norfolk County Council* (5) were also referred to.]

Abel Thomas, K.C., and *E. M. Samson*, for the plaintiff. Pembroke is an ancient borough which has the right of appointing and the duty of paying its own police. The cost of policing the borough is cast upon the borough fund, and the borough must prima facie pay for the costs of its own prosecutions. The defendant must shew that there is some enactment which takes away the common law obligation upon the borough to pay for the costs of the prosecutions before the borough justices. Sect. 140 of the Municipal Corporations Act, 1882, shews that the borough must bear these costs. That section provides that the borough fund "shall be applicable to and charged with" the several payments specified in Sched. V. to the Act; and the words in Sched. V., Part II., paragraphs 6 and 12, include the costs of prosecutions before the borough justices where those costs are not paid by the parties chargeable. Those costs must be written off as lost. The prosecutions are borough prosecutions, and the fact that, for the sake of convenience, the superintendent of police for the county district in which the borough is situate lends his name for the purpose of originating the prosecutions can make no difference. This is not affected

(1) Dears. C. C. at p. 51; 22 L. J. (M.C.) at p. 47.
(2) L. R. 3 Q. B. at pp. 249, 251.
(3) [1900] 1 Q. B. at pp. 295, 298.
(4) (1844) 5 Q. B. 862.
(5) [1898] 2 Q. B. 468.

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by s. 6 of the Justices Clerks Act, 1877, under which the penalties are to go to the treasurer of the county, the words "borough or place" having a meaning ejusdem generis with that of the preceding words "county, riding, division," and denoting a place having a separate Court of quarter sessions. The Costs in Criminal Cases Act, 1908, does not touch this question. There is no hardship upon the borough, as it has a corresponding advantage, namely, a right to draw upon the county police in any emergency.

Sankey, K.C., in reply.

Cur. adv. vult.

June 23. SCRUTTON J. read the following judgment:—This case was commenced before me at the Pembroke Assizes, and, as it appeared to involve the consideration of statutes and authorities not available there, after the local evidence had been taken it was adjourned to London for further consideration.

The plaintiff, as clerk to the Pembrokeshire County Council, by the writ and statement of claim claimed penalties from the defendant, the clerk to the justices for the borough of Pembroke, for not delivering in proper form a return of fines and fees as required by the Justices Clerks Act, 1877, s. 6. The parties were friendly, and it appeared that they really wanted certain points of principle, as to the destination of certain fines and the incidence of certain fees, determined, and I allowed amendments claiming declarations on these points to be made.

The facts are short and not in dispute. The borough of Pembroke is an ancient borough, of over 10,000 inhabitants. It has no separate quarter sessions, but it has a separate commission of the peace and justices' clerk. Following the decision in *Thetford Corporation* v. *Norfolk County Council* (1), the borough pays for its justices' clerk; he is paid by salary, and the clerk's fees received from prosecutions, whether from the prosecutor or defendant, go to the borough fund. As an ancient borough, it has in some way, which was not stated to me but was agreed by the parties to have that effect, the right of appointing and paying for its own police, and correlative freedom from the county

(1) [1898] 2 Q. B. 468.

police rate. It exercised that power by contracting with the county, on September 7, 1858, for the services of a certain number of police, for whom it paid a fixed sum. (1) This number was subsequently increased, the borough paying what was supposed to be the exact cost of the additional men. There is ordinarily, in boroughs having their own police force, a watch committee, who direct prosecutions. It was stated that no watch committee had met in Pembroke for thirty years. The origination of prosecutions in the borough was undertaken by the superintendent of a district of the county, which included the area of the borough, or by a sergeant under him. The services of the superintendent were not expressly paid for by the borough; the sergeant was one of the police paid for.

Certain statutes creating offences do not provide for the appropriation of the fines imposed under them. It appears that these, which I call unappropriated fines, had for some years, when imposed by the Pembroke borough bench, been retained by the borough treasurer. It further appears that, when the police were prosecutors, the clerk to the borough justices did not in the first instance collect his fees from them, looking forward to receive them from the costs which the defendant was ordered to pay. This course of business arose from the view that as the borough treasurer would provide the fees for prosecutions conducted by the borough police and would receive these fees when paid to the clerk, it was unnecessary to go through the formality of paying the money.

Disputes arose between the borough and the county of Pembroke, and, amongst other matters, the county claimed that the unappropriated fines should be paid to the county treasurer, and required an account to be rendered to him by the clerk to the borough justices. The latter, in rendering that account, deducted the fees due to him in prosecutions undertaken before him by the police in cases where, owing to lack of means or the defendant's going to prison or the failure of the prosecution, those costs were not obtainable from the prosecution.

(1) This sum was calculated in accordance with the agreement of September 7, 1858, under which the borough was for the purposes of police consolidated with the county.

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Thereupon the county brought this action for penalties. In the course of the trial Mr. Sankey, for the borough, admitted that the construction which had been placed in several cases on words similar to those in s. 6 of the Justices Clerks Act, 1877, prevented him from arguing that unappropriated fines imposed by the borough bench were not payable to the county treasurer. The pleadings were amended by claiming a declaration to that effect, and I accordingly declare that fines imposed by the Pembroke borough bench and not otherwise appropriated are, unless some legal defence is shewn, payable to the treasurer of the county of Pembroke. I was not asked to decide the question of the amount of these fines, and the limitation in the declaration is inserted to save for the defendant the question whether the claim for some of the fines is not statute-barred. The account already rendered by the defendant did not follow the statutory form and concluded by deducting from the fines payable to the county council the fees already referred to, alleged to be due from the county council. Mr. Sankey, for the defendant, admitted before me that the terms of the Justices Clerks Act, 1877, and the decision in *Wray* v. *Chapman* (1) prevented him from making deductions from the amount shewn due of any cross-claims however good; and I therefore make a declaration in terms asked by the second amendment and seventh paragraph of the original claim, without prejudice to his right to raise the question that payment of some of the sums is statute-barred.

There remains the question now really in dispute between the parties: whether, in prosecutions instituted by the police in which the fees of the justices' clerk are not recovered from the defendant but fall upon the prosecution, such fees should be defrayed by the county or the borough. Mr. Sankey argued that the administration of justice was prima facie a county burden, unless express enactment put it on some other area; and he further said that the decisions had endeavoured to make burden and benefit correlative, and that where, as here, the county get the benefit of the fines recovered, they should also take the burden of the costs of the prosecution. Mr. Thomas, for the

(1) 14 Q. B. 742.

plaintiff, argued that Pembroke, as an ancient borough, appointed its own police and paid for them, and that, if they prosecuted, the borough, whose servants they were, must defray their expenses if those expenses were not recovered from the defendant. I am of opinion that the contention of the plaintiff is right, and that the burden of these fees must fall on the borough of Pembroke. I attach no importance to the fact that payment of the fees is not asked for from the police at the time. The prosecutor is prima facie liable for the expenses of the prosecution, and if by mischance he does not recover them from the defendant he must bear the loss, unless by statute or common law he has some remedy over. Nor do I think that the fact that the borough has not formed a watch committee but has delegated its authority to control prosecutions by its police to a county superintendent affects the matter. The borough has the right to appoint its own police and the duty to pay for them; and, if the police incur expenses in prosecutions, it has the duty to reimburse them. If, therefore, the clerk required payment of fees by the prosecution step by step, the police who prosecuted could, in my opinion, recover these sums from the borough fund under the conditions provided in s. 140 and the Fifth Schedule of the Municipal Corporations Act, 1882 (see especially Part II., par. 6); and I find no statute or common law principle which enables me to put a sum which the justices' clerk can recover through the prosecution from the borough on to the county.

I have carefully considered Mr. Sankey's forcible argument on the subject of benefit and burden, and at first sight it seems odd that the county should get the benefit of fines, and the borough bear the costs of the prosecutions. But it would be equally odd if the borough could take the costs recovered in successful prosecutions and put the costs of unsuccessful ones on the county; or, to put it in another way, it would be odd if, where the prosecution succeeded in recovering costs from the defendant, the borough should take them, while if the prosecution failed for any reason to recover costs the county should bear the burden. This would be the case if Mr. Sankey's argument is correct. The truth appears to be that the argument of benefit and burden has been applied by the judges to support their

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application of the ejusdem generis rule of construction to a particular set of statutory phrases by shewing that this construction works justice by putting the benefit and the burden on the same shoulders. But in the case before me admittedly parts of the benefit and burden are already on different shoulders. The burden of the cost of the police and the burden of the cost of the clerk to the justices are on the borough, while the benefit of costs recovered from successful prosecutions is on the borough, and a statute has placed the benefit of fines on the county. Burden and benefit are admittedly not on the same shoulders, and under these circumstances, there being no statute to construe, I do not think any safe guidance can be obtained from the supposed rule in settling the incidence of another burden which in my view is only a consequence of burdens already borne, and indeed clung to, by the borough.

I have carefully considered the statutes and authorities cited by Mr. Sankey, and see nothing in them to affect the line of reasoning by which I have arrived at the above conclusion. I must, therefore, make a declaration in favour of the plaintiff, that the costs of prosecutions undertaken by the police before the justices for the borough of Pembroke in cases in which such costs are not remitted and are not paid by the defendant are not chargeable to the funds of the county of Pembroke; and, as the plaintiff has substantially succeeded, I give him judgment for the above declarations, with costs.

Judgment for plaintiff.

Solicitors for plaintiff: *Rawle, Johnstone & Co.*

Solicitors for defendant: *Ford, Lloyd, Bartlett & Michelmore, for Lowless & Lowless, Pembroke.*

W. F. B.

THE CITY OF BIRMINGHAM TRAMWAYS COMPANY, LIMITED *v.* LAW.

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April 23;
May 28.

Negligence—Lease of Tramway—Lessor to execute Repairs at Cost of Lessee—Contract for Repairs by Lessor with Contractor—Lessee not Party to Contract—Negligence by Contractor in executing Repairs—Accident to Tramcar—Liability of Contractor to Lessee—Damages—Compensation paid to Passengers—Right of Lessee to recover from Contractor.

The corporation of a borough were the owners of a tramway in the borough, and they granted a lease of the tramway, of which lease the plaintiffs were the assignees. Under the lease the repairs necessary to keep the tramway in working order were to be executed by the corporation at the cost of the plaintiffs. During the currency of the lease the tramway required to be relaid at a certain place, and an agreement was entered into between the corporation and the plaintiffs which, after reciting that the corporation at the request and with the consent of the plaintiffs had agreed to relay the tramway, provided that the corporation would relay the tramway, and would during the execution of the work provide where necessary a temporary track for the purpose of enabling the plaintiffs, as far as possible, to maintain their service of trams, and the agreement further provided that nothing therein contained should render the corporation liable in the event of any accident, injury, or damage being occasioned to or sustained by the plaintiffs, their servants or passengers, or their rolling stock, through or arising out of the execution by the corporation of the work, but that the corporation would insert in the contract to be entered into by them a provision imposing upon the contractor full responsibility for all claims and demands resulting from any such accident, injury, or damage. The corporation thereupon made a contract with the defendant, to which the plaintiffs were not parties, which recited the lease and that the corporation had at the request and with the consent of the plaintiffs, subject to certain conditions, agreed to relay the tramway, and by which the defendant agreed to execute the work of relaying the tramway and to indemnify the corporation against all actions and claims for compensation to workmen and passengers carried on the tramway arising out of the execution of the work, and that the defendant should, during the execution of the work, be responsible for all accidents. During the execution of the work the tramcars continued to run, and a car which was carrying passengers was derailed and overturned owing to the negligent manner in which certain of the work was being carried out at the place where the accident happened, and the passengers and driver were injured, and the tramcar was damaged. The plaintiffs paid compensation to the passengers and driver, and claimed to recover from the defendant the amounts so paid and the cost of repairing the tramcar:—

Held, that, though the plaintiffs were not parties to the contract

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between the corporation and the defendant, yet inasmuch as the plaintiffs' proprietary rights as lessees of the tramway and their right of passage on the highway had been injuriously affected by the act of the defendant, the latter was liable in damages to the plaintiffs; and that, as the work of relaying the tramway while the tramcars were running involved risk of danger to the passengers in the tramcars, the plaintiffs were liable to their passengers, and were entitled to recover from the defendant the sums properly paid as compensation to the passengers who were injured, as well as the sum paid as compensation to the driver and the cost of repairing the tramcar.

FURTHER CONSIDERATION of an action tried before A. T. Lawrence J. without a jury at Birmingham.

The statement of claim alleged that the plaintiffs were the lessees from the Corporation of Birmingham of certain tramways situate in Bristol Road, in the city of Birmingham, and as such carried passengers for hire on the tramways; that in October, 1908, the defendant with the licence and consent of the plaintiffs, and in pursuance of a contract in writing dated May 15, 1908, and made between the defendant and the Corporation of Birmingham, was engaged in relaying the tramway track in Bristol Road, and for that purpose had removed one of the double lines of the tramway and excavated the ground thereunder, leaving the other line free for the carriage of passengers by the plaintiffs; and that on October 4, 1908, in consequence of the negligent and unskilful manner in which the work was carried out by the defendant's servants, one of the plaintiffs' tramcars, while passing along the tramway at about 9 P.M., was derailed and fell into the excavation, and the driver of and several of the passengers in the tramcar were injured, and the tramcar was damaged. The plaintiffs claimed 421*l.* 15*s.* 4*d.*, made up of (1.) 364*l.* 14*s.* paid as compensation to the injured passengers; (2.) 5*l.* 11*s.* paid as compensation to the driver; and (3.) the expense of removing and repairing the tramcar and other incidental expenses. The defendant in his defence denied that he was negligent and pleaded that the statement of claim disclosed no cause of action against him.

The Corporation of Birmingham, who were the owners of a double line of tramways, laid along, among other streets in Birmingham, Bristol Road, by a lease under seal dated

February 18, 1891, demised to the plaintiffs' predecessors in title for the term of twenty-one years from July 1, 1890, the right of user of the tramways and of taking tolls and charges in respect thereof, the lessees paying to the corporation a yearly rent therefor and also an additional sum equal to the actual cost which the corporation should from time to time or at any time during the term expend or incur in or about the maintenance, repair, or renewal of the tramways and works and the roadways under the covenant on the part of the corporation thereinafter contained, such cost to be certified by the city surveyor.

By clause 17 of the lease the lessees covenanted that they would not, unless for the purpose of necessary repairs, or without the consent of the corporation, at any time remove, destroy, or in any way interfere with the tramways or any part thereof; and by clause 24 the lessees covenanted as follows: "The lessees shall not in any way interfere with the corporation or any workmen, servants, or agents employed by the corporation in executing or doing any repairs, works, or things in or about the tramways which under or by virtue of any of the covenants or provisions herein contained or otherwise the corporation, whether as lessors or owners of the tramways or as local or road authority or as owners of gas or water undertakings, shall be liable or entitled or required to execute or do. The corporation shall at all times endeavour to execute and do all such repairs, works, and things as aforesaid as speedily as reasonably can be, and so as to cause as little interference as possible with the tramways or the traffic thereof, but the corporation shall not be liable to pay to the lessees any compensation or damages for or in respect of delay or injury caused by or arising out of the execution or doing of any such repairs, works, or things, or for loss of traffic occasioned thereby."

By clause 31 the corporation covenanted with the lessees that they "will during the continuance of the term hereby created at their own cost maintain, repair, and so far as may be necessary renew the tramways and also so much of the road as lies between the rails of the tramways and the portion of the road between the two lines of tramways and so much of the road as extends eighteen inches beyond the rails of and on each side

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of the tramway, and will generally do all repairs necessary for keeping the tramways in good working order (including repairs or renewal of anything forming part of or used in connection with the tramways, the repair and maintenance of which would necessitate the disturbance of the surface of the street or roadway)."

By deed dated May 28, 1897, the lessees with the consent of the corporation assigned to the plaintiffs for the residue of the term all their rights under the above-mentioned lease, subject to the covenants and conditions therein contained.

In 1908 the tramways in Bristol Road became out of repair in consequence of the waterlogged condition of a portion of the road, and it was considered necessary to relay them. Accordingly an agreement dated May 7, 1908, was made between the Corporation of Birmingham and the plaintiffs, which, after reciting that the corporation "at the request and with the consent" of the plaintiffs had agreed to relay such portion of the track of the said tramways in Bristol Road as lay between two specified points, provided that "the corporation will with reasonable expedition and in accordance with plans and specifications already prepared by the Birmingham city surveyor and approved by the company relay the portion of the said tramway track in Bristol Road aforesaid" lying between the two specified points. The agreement also provided, in clause 3, that "the corporation will during the execution of the said work provide as much temporary track as may be reasonably necessary in Bristol Road aforesaid by the side of the existing track for the purpose of enabling the company as far as possible to maintain their service of trams; provided always that the corporation shall not be liable or responsible for any loss which the company may suffer through diminution of traffic or otherwise consequent upon the execution by the corporation of the work hereby contemplated, but the corporation shall use their best endeavours to avoid or minimise any such loss." By clause 4 the plaintiffs agreed in satisfaction of all liability in respect of the cost of the relaying of the tramway until the expiration of the lease to pay to the corporation interest at the rate of 10 per cent. per annum upon the actual cost of the

work and of providing the temporary track, the certificate of the Birmingham city surveyor as to such cost to be final and binding upon the parties. Clause 6 was as follows: "Nothing herein contained shall render the corporation liable in the event of any accident, injury, or damage being occasioned to or sustained by the company, their officers, servants, or workmen, or the passengers carried upon their tramway carriages, or to or by the rolling stock, apparatus, or any other property of the company through or in any way arising out of the execution by the corporation of the work hereby contemplated. Provided always, but without prejudice to the position of the corporation under the foregoing provisions of this clause, that the corporation shall insert in the contract to be entered into by them a provision imposing upon the contractor full responsibility for all claims and demands resulting from any such accident, injury, or damage, and also a provision that the works shall be completed within four calendar months from the date when the same are commenced, and imposing upon the contractor fixed sums by way of damages for failure to complete within such time subject to the right of the Birmingham city surveyor to grant such extensions of time as he may consider fair and reasonable. And further the corporation shall give to the company the benefit of such provisions, and also at the request and cost of the company enforce the same for the benefit of the company."

On May 15, 1908, the defendant (therein described as the contractor) entered into a contract with the Corporation of Birmingham to execute the work of relaying the above-mentioned portion of the tramways, which was then being worked by electric power, in Bristol Road subject to the general conditions and specifications annexed thereto. The contract recited the lease of February 18, 1891, of which the plaintiffs were the assignees, and that the corporation had at the request and with the consent of the plaintiffs agreed subject to certain terms, conditions, and agreements to relay a portion of the track of the tramways, and in clause 5 it provided that "in accordance with clause 18 of the said general conditions the contractor hereby indemnifies and will save harmless the corporation from all actions, suits, claims, damages, and expenses for or in respect of compensation to

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workmen or to their dependants, or to any other person or persons whomsoever, including the officers, servants, and workmen of the lessee company and the passengers from time to time carried in or upon the tramway carriages passing along Bristol Road aforesaid which may be brought against the corporation or which they may suffer, incur, or be put to either at common law or under any Act or Acts of Parliament, including the Fatal Accidents Act, 1846, the Employers' Liability Act, 1880, and the Workmen's Compensation Act, 1906, and any Act or Acts amending or extending them or any of them, through, in consequence, or in any way arising out of the execution of the work the subject of this contract, and such indemnity shall be deemed to include all cases in which the corporation are or may be liable as an employer or undertaker in consequence of the provisions of the said Acts or any of them, whether or not the contractor is so liable either at common law or under any statutory provision. And further the contractor will, if and when required by the corporation so to do, secure the due performance of this indemnity either by entering into such policy or policies of insurance as the corporation shall approve, or by otherwise securing the latter to their entire satisfaction against any liability hereunder." Clause 6 provided that "the contractor shall also be responsible for all damage or injury which may happen or be occasioned to or sustained by any animals, vehicles, buildings, or other property of what nature or kind soever and to whomsoever belonging (including the rolling stock, apparatus, or other property of the lessee company) consequent upon or in any way arising out of or connected with the execution of the work, the subject of this contract, and the contractor hereby indemnifies and will save harmless the corporation from and against all actions, claims, demands, and proceedings, costs, damages, and expenses, which may be brought or made against the corporation or which they may suffer, incur, or be put to by reason or in respect thereof." Clause 2 of the general conditions, under the heading "Scope of Contract," stated that the contract included providing "for the care and safety of everything in connection with the works, and for the safety and convenience of the public during their progress." Clause 18 of the general conditions, under the heading

"Care of Works," provided that "from the commencement until the delivering up of the works the care of the same shall rest entirely with the contractor, and he shall be responsible for all accidents, from whatever cause arising, and for anything that may be stolen, removed, or destroyed, to whomsoever belonging; and he shall also be responsible for all injuries to workmen or other persons, and for the making good of all damage and defects to the works or adjacent roads or property or gas and water pipes, electric supply, telegraph or telephone mains, pipes, or wires, arising from carelessness, bad or insufficient materials or workmanship or any other cause whatever, and whether such damage or defect be discovered during the progress of the works or after completion thereof, or whether payment may wholly or partially have been made or the works approved as supposed to have been properly done; and no certificate of approval of any work by any officer of the corporation shall affect or prejudice the right of the corporation against the contractor, or be considered or held at all conclusive as to the sufficiency of any works or materials." Clause 19 of the general conditions, under the heading "Damage to property to be made good," provided that "the contractor shall make good any loss of or damage that may be occasioned to any property belonging to the corporation or others by reason of the execution of the works, or for delay or loss of traffic due to derailment of cars on the temporary track, or by the conveyance or removal of material or implements thereto or therefrom, including the opening or blocking of any street or road, or the execution of the works, or from any material or plant which may be left lying about, or from any holes or depressions which may be created, or from any other reason arising out of the works, and shall indemnify the corporation from all losses, expenses, claims for damages in relation thereto, whether to persons, animals, vehicles, property, or things which any person may make or sustain against the corporation in respect of the work in pursuance of his, her, or its lawful purpose, rights, business or calling. The contractor shall efficiently rail off and protect such portions of the road or waste as are undergoing alterations, and shall put up such notice and shall at night fix such lamps and

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provide sufficient watchmen by night and by day as may be necessary in the opinion of the city surveyor to effect this object. The corporation may compromise any such action or claim as aforesaid on such terms as they shall think fit; and the contractor shall on demand pay to the corporation the sum or sums paid by the corporation upon the occasion thereof, and such further sum or sums as shall fully indemnify them in respect of such action or claim."

The defendant proceeded to execute the work of relaying the tramway track in Bristol Road, where there was a double line of tramways. One line was under repair, and at the time of the accident hereinafter mentioned the traffic was carried on upon the other line. Upon October 4, 1908, while one of the plaintiffs' tramcars, which was carrying passengers, was passing along the line which remained in use, the tramcar was derailed and overturned, with the result that a number of passengers in the tramcar and the driver were injured and the tramcar was damaged. The plaintiffs paid compensation to the injured passengers and to the driver, and claimed to recover the amounts so paid as well as the other expenses above mentioned from the defendant.

At the trial at Birmingham the learned judge found that the derailment and overturning of the tramcar was caused by the negligence of the defendant's servants in executing certain work at the place in question. The details of the negligence are stated by the learned judge in his judgment. The question as to the liability of the defendant was reserved for further consideration.

L. Batten, *K.C.*, and *H. Maddocks*, for the plaintiffs. The plaintiffs were lawfully using the highway and the tramway lines laid thereon, and in the course of that lawful user an accident happened to their tramcar owing to the negligent manner in which the defendant executed certain work in connection with the relaying of the tramway. Under the terms of the lease of the tramways the Corporation of Birmingham were the persons who were to repair the tramways. Under the terms of the two contracts of May 7 and 15, 1908, the defendant became the licensee of the plaintiffs to enter upon the tramway

for the purpose of relaying it in a proper manner. He was not their licensee to do the work negligently. By executing the work negligently he has interfered without lawful excuse with the proprietary rights of the plaintiffs in the tramway. He ceased to be a licensee and became a trespasser, and by his negligence he created a nuisance on the plaintiffs' property and became liable to the plaintiffs for any damage caused to them by reason of his wrongful act. The case of *Malone* v. *Laskey* (1) is distinguishable, because there the plaintiff had no proprietary right which was interfered with.

With regard to the damages, the plaintiffs are entitled to recover not only the amount of compensation paid to the driver of the tramcar and the expense of repairing the tramcar, but also the sums paid as compensation to the passengers who were injured in the tramcar. The plaintiffs owed a duty to the passengers in their tramcars to take care that the tramway was reasonably fit for the carriage of passengers. The relaying of a tramway while the tramcars are running is necessarily a work involving risk of injury to passengers using the tramway, and the plaintiffs cannot, by delegating that work to a contractor, get rid of their duty to their passengers. The defendant is therefore liable for the amount claimed. [*The Winkfield* (2) was referred to.]

Hugo Young, *K.C.*, and *W. Shakespeare*, for the defendant. The rights and obligations of the parties are determined by the contracts which they have entered into. By the lease of the tramways, of which the plaintiffs are the assignees, the Corporation of Birmingham have reserved to themselves the right of repairing the tramways, and have stipulated that they are not to be liable to pay to the lessees any compensation or damages for or in respect of any injury caused by or arising out of the execution of the repairs. In the contract of May 7, 1908, between the corporation and the plaintiffs it is recited that the corporation had agreed to relay a portion of the tramway at the request and with the consent of the plaintiffs, and it is provided that the corporation shall not be liable for injury or damage to passengers carried upon the tramway arising out of the execution

(1) [1907] 2 K. B. 141. (2) [1902] P. 42.

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of the work. The corporation not being liable, their servants or agents are not liable, and therefore the contractor employed by them to execute the work cannot be liable. The plaintiffs therefore have, by the terms of the contracts, debarred themselves from recovering damages against the defendant. The defendant is a licensee from the corporation to enter upon the tramways and relay the lines, and the terms of that licence are contained in his contract with the corporation, which does not impose upon him any liability to the plaintiffs. The corporation are not parties to the action. The action is based entirely upon negligence, and the duty to take care arises out of contract, and the plaintiffs, who are no parties to the contract with the defendant, cannot take advantage of any duty arising under that contract: *Earl* v. *Lubbock* (1); *Cavalier* v. *Pope* (2); *Malone* v. *Laskey*. (3)

Next, if the defendant is liable in this action, the plaintiffs are not entitled to recover the sums paid as compensation to the passengers who were injured in the tramcar. The plaintiffs are not insurers of the safety of their passengers; they only contract to take due care to carry them safely: *Readhead* v. *Midland Ry. Co.* (4); *Francis* v. *Cockrell*. (5) The negligence of the defendant did not render the plaintiffs liable to their passengers: *Kiddle & Son* v. *Lovett*. (6) The plaintiffs could only have been liable to their passengers upon the ground that they had been guilty of want of care towards them: *Mowbray* v. *Merryweather*. (7) There is no finding of negligence on the part of the plaintiffs; but even upon the assumption that the plaintiffs were guilty of negligence towards their passengers and properly paid them compensation, their negligence precludes them from recovering against the defendant. The plaintiffs therefore cannot recover the amount paid to the passengers as compensation. [*Burrows* v. *March Gas and Coke Co.* (8) was also referred to.]

L. Batten, K.C., in reply. The duty of the plaintiffs towards

(1) [1905] 1 K. B. 253.
(2) [1906] A. C. 428.
(3) [1907] 2 K. B. 141.
(4) (1869) L. R. 4 Q. B. 379.
(5) (1870) L. R. 5 Q. B. 184, 501.
(6) (1885) 16 Q. B. D. 605.
(7) [1895] 2 Q. B. 640, at p. 643.
(8) (1870) L. R. 5 Ex. 67.

their passengers was to take reasonable care that the tramway lines were fit for carrying passengers, and for that purpose to inspect the lines. That is a totally different duty from that which the defendant owed to them.

Cur. adv. vult.

May 28. A. T. LAWRENCE J. read the following judgment :— This action is brought to recover compensation for injuries sustained by the derailment and overturning of an electric tram-car, the property of the plaintiff company, while travelling with a number of passengers on board. The damages have been agreed at 421*l.* 15*s.* 4*d.*, in the event of the plaintiff company establishing the defendant's liability.

The accident occurred at 9 P.M. on Sunday, October 4, 1908. The car was travelling at a slow pace on an up gradient in the Bristol Road, one of the main highways leading out of Birmingham. There are two lines of rails in the Bristol Road, but at this time only one remained in use, this section of the tramway being in course of reconstruction by the defendant, the contractor for the works. An examination of the spot immediately after the accident disclosed the fact that one of the wooden blocks which formed the surface of the roadway had become displaced close to the near rail of the line in use. It bore traces of a blow, and there were corresponding marks on the gear case of the car. After a careful consideration of the evidence on both sides I came to the conclusion that the derailment of the car was due to this block. At the request of counsel I gave them my findings on the facts, and then heard argument upon the question of liability. The facts found were these : The derailment of the car was caused by the block, which had risen, coming into contact with the gear box. The marks seen by the witness Baker, nine feet before the block was reached, were not caused by the wheels of this car. The rising of the block which caused the accident was not the result of natural causes, but was due to the mode in which the work of raising the bed of concrete in which both lines were fixed was performed by the defendant's servants. This removal of the concrete was carried out in a manner that rendered some disturbance of the concrete under the running

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line almost certain to occur. This manner of removal was adopted because the work was late, and in view of the short period of life remaining to the running line. It involved (1.) disturbance of the concrete under and adjacent to the near rail of the running line ; (2.) the admission of moisture between this concrete and the blocks above it ; (3.) consequent risk of such blocks swelling and becoming displaced. I hold that there was negligence or an absence of reasonable skill and care in executing this work. Having regard to these risks, a guard rail should have been used; if properly fixed in position I think it would have prevented the car from overturning and would have reduced the damages to something almost nominal. The defective condition of the wheels of the car, though considerable, did not cause the accident or contribute to cause the accident. The wheels were in a condition which involved danger on sharp curves, or when speed was great. They were quite safe on this portion of the line, and at the speed proved, but for the displaced block above mentioned.

It was contended for the defendant that, notwithstanding these findings, he was under no liability to the plaintiff company because there was no contractual relation and, it was alleged, no duty between them. The facts upon this subject were as follows: The Corporation of Birmingham was the tramway authority who owned these lines. The plaintiff company was the assignee of a lease of this tramway granted by the corporation for twenty-one years from July 1, 1890. Under this lease the repairs of the tramways were to be executed by the corporation at the cost of the plaintiff company. In 1908 it was considered desirable to reconstruct the lines of tramway in Bristol Road, and on May 7, 1908, an agreement was entered into between the corporation and the plaintiff company for this purpose. This contract provided for facilities being afforded so as to enable the company to maintain the service of trams during the execution of the works, and also that the corporation should insert in the contract to be entered into a provision imposing upon the contractor full responsibility for all claims resulting from accident, injury, or damage sustained by the company from the execution of the works. On May 15, 1908,

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the corporation entered into an agreement with the defendant for the relaying of the track. This contract recited that the plaintiff company was the lessee of the tramway, and that the corporation had "at the request and with the consent of" the company agreed, subject to certain terms, conditions, and agreements, to relay the track. The plaintiff company was not a party to this agreement. The defendant by it agreed to indemnify the corporation, and undertook to be responsible for all damage consequent upon or arising out of the execution of the work.

It was argued for the defendant that, there being no privity of contract between the plaintiff company and the defendant, and the corporation being no party to the action, this action could not be maintained. Many cases were cited in support of this contention. There can be no doubt that the plaintiff company cannot sue upon the contract of May 15, 1908, to which it is no party. It is also true that a person having no right whether of property or otherwise could not maintain an action in the absence of fraud. But these propositions do not, in my opinion, apply to this case. The plaintiff company was the lessee in possession of these lines of tramway, and it is the defendant and not the plaintiff company who needs the contracts of May 7 and 15 to explain his presence upon the scene. For purposes of defence they are not sufficient, for the defendant has not observed their terms. Apart from these contracts, the defendant would be a trespasser ab initio, and his dealings with the roadway a nuisance at common law. The plaintiff company, on the other hand, was a lawful carrier of passengers upon the highway and was something more; because the company was also a statutory lessee of the tramways in such highway, duly exercising rights of passage and of property therein. The contracts seem to me merely to shew that the defendant knew the position of the plaintiff company and undertook to respect it. How the fact that he has given such an undertaking to a person not a party to the action, and has broken it, can afford him any defence against liability to the plaintiff company for acts which cause obstruction and damage to the plaintiff company in its use of the tramway highway I do not understand. It seems to me that [the acts of the defendant injuriously affected both the

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proprietary rights of the plaintiff company as lessee of the tramway and also its rights of passage on the highway. The defendant can only attempt to justify his acts by producing the agreements as affording him "leave and licence" for what he did. This their terms contradict. He cannot set them up in part and decline to be bound by those terms that are inconvenient.

It was further argued, as to the damages paid by the plaintiff company to the passengers upon the car, that these were voluntary payments upon the part of the plaintiff company, as it was said that the plaintiff company was under no liability to the passengers for the acts of the defendant. This I think is incorrect. The plaintiff company was liable to the passengers. The plaintiff company had requested and consented to the reconstruction and was to pay for it, and it was manifestly a dangerous thing to do while maintaining the service of tramcars, unless proper precautions were taken. The plaintiff company could not by delegating this work of reconstruction to some one else, or by interposing another person or persons between itself and the contractor, evade its obligation to its passengers. Its duty to its passengers remained, and it must see that duty performed either by itself or by the person doing the work of reconstruction. If there was negligence in the performance of the work the duty in question was not performed, and it would be no answer for the plaintiff company to say "I authorized the work to be done, but I had no contractual relation with the person doing it."

I do not deal with the cases cited in detail, because I do not think that any of them apply to the facts of this case. In none of them was any right, whether of property or of passage, belonging to the plaintiff therein infringed. The plaintiff company is entitled to judgment for the amount agreed.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Field, Roscoe & Co., for Pinsent & Co., Birmingham.*

Solicitors for defendant: *W. Shakespeare & Co., Birmingham.*

W. F. B.

[IN THE COURT OF APPEAL.]

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Company—Debenture—Floating Security—Garnishee Order.

A debenture, constituting a floating security over the undertaking and assets of a company, does not specifically affect any particular assets until some event occurs or some act on the part of the mortgagee is done which causes the security to crystallize into a fixed security. A demand by the debenture-holder of the payment by the company of the money secured by his debenture is not such an act; nor is a notice by him to the company's bankers claiming payment to him of the company's bank balance which has been attached by a judgment creditor of the company under a garnishee order; for there is no equity in a debenture-holder, whose security is a floating charge, arising from his merely giving notice to seize a particular asset of the company.

APPEAL of the plaintiff from the decision of a Divisional Court. It appeared that on July 28, 1905, the defendant company, being indebted to one Lionel Phillips in the sum of 13,000*l.*, executed an indenture (which Phillips also executed), which, after reciting the fact of the debt and of a guarantee by Phillips of a bank overdraft to the extent of 3000*l.*, and an agreement by the company to give security therefor, witnessed as follows:—

"1. The company hereby binds itself to pay to the said L. Phillips or his representatives on demand the sum of 13,000*l.* (being the aggregate amount of the principal moneys due to him for advances as aforesaid) and also such further sum or sums (if any) as the said L. Phillips or his representatives shall pay in respect of his said guarantee of the bank overdraft together with interest thereon from the date of the respective advances or payments at the rate of 5*l.* per cent. per annum.

"2. The company as beneficial owner hereby charges with such payments its undertaking including the goodwill of its business and all its property and assets whatsoever and wheresoever both present and future.

"3. The said L. Phillips or his representatives may at any time after the principal moneys hereby secured have become payable appoint by writing a receiver (at a commission not exceeding 5 per

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cent. on the gross amount of all moneys received by him) to take possession of the property and assets comprised in this security.

"4. A receiver so appointed shall have power

"(*a*) To take possession of the property and assets hereby charged

"(*b*) To carry on or concur in carrying on the business of the company

"(*c*) To sell or concur in selling any or all of the property and assets hereby charged.

"The receiver shall apply all moneys received by him in the manner directed by the first three clauses of s. 24 sub-s. 8 of the Conveyancing and Law of Property Act, 1881, and subject thereto shall apply such moneys in satisfaction of what is due to the said L. Phillips or his representatives under his securities and shall pay the surplus (if any) to the company.

"5. No profits shall be applied by the company in payment of a dividend or bonus to shareholders unless and until the said bank's overdraft shall have been paid off and the liability of the said L. Phillips in respect thereof shall have ceased and unless and until all moneys due to the said L. Phillips by the company with interest thereon at the rate aforesaid shall have been paid it being the intention that all profits made by the company shall be applied so long as is necessary in reduction of the moneys due to the said L. Phillips."

The interest of Phillips in this security became in due course vested in one Pitman, the claimant in the present case.

On August 12, 1908, the plaintiff brought an action in the county court against the defendants to recover the rent of a cottage leased by him to the defendants. On August 30, 1908, Pitman, who had become the transferee and holder of the debenture above set out, demanded payment from the defendants of the 13,000*l.* secured by the debenture, but took no further step to enforce his security. In November, 1908, the plaintiff recovered judgment for 86*l.* 1*s.* 8*d.* against the defendants in the county court. The judgment not being satisfied, the plaintiff in April, 1909, obtained a garnishee order nisi against the banking account of the defendants with the North and South Wales

Bank. The debenture-holder gave notice to the bank that he contested the right of the plaintiff to attach the balance due from the bank to the defendants on their banking account and demand payment thereof to himself; and he opposed an application by the plaintiff in the county court that the garnishee order should be made absolute, on the ground that as holder of the debenture he had priority over the plaintiff as judgment creditor. In August, 1909, the county court judge made the garnishee order absolute, but an appeal by the debenture-holder was allowed by the Divisional Court (Phillimore and Bucknill JJ.), who set aside the garnishee order. From that decision the plaintiff now appealed.

Gore Browne, K.C., and *A. S. Carr* (*Artemus Jones* with them), for the judgment creditor. It is of the essence of a floating charge, such as was given to the debenture-holder in the present case, that it remains dormant and inoperative as regards any particular assets until it is converted into a charge on specific assets by the debenture-holder intervening and taking the proper steps to make it attach to all the existing assets of the company. Until that moment arrives, it has no present operation to confer an interest on the debenture-holder in a specific asset: *Governments Stock and Other Securities Investment Co.* v. *Manila Ry. Co.* (1) On the giving of such a charge, it is contemplated that until the debenture-holder intervenes and turns his floating charge into a charge on specific assets the company shall continue to carry on business and, in order to do that, shall have the power of dealing with its assets in the ordinary course of business unincumbered by the charge. In the present case, therefore, the company would still have power, notwithstanding the floating charge, to apply its assets to the liquidation of the debts incurred by it for the purposes of and in the ordinary course of its business. The company could have sold goods belonging to it and have voluntarily paid a debt, such as this judgment debt, out of the proceeds of that sale. The same principle would apply to the compulsory payment of such a debt by compulsion of law. If a judgment

(1) [1897] A. C. 81, at p. 87.

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were recovered against the company and it did not pay the amount of the judgment debt, and its goods were consequently taken under a fi. fa., the debenture-holder could not, by merely giving notice of his charge to the sheriff, make that charge attach to the goods so seized so as to obtain priority over the judgment creditor. The debenture-holder cannot take up the position that he will allow the company to continue to carry on business, and reserve the right, while still permitting it to go on obtaining credit, of preventing any one who deals with it from getting paid. Until the debenture-holder appoints a receiver, or takes legal proceedings to enforce his security, that security does not attach to any specific asset of the company. The debenture-holder cannot pick out one particular asset of the company and make his charge attach to that asset, while allowing the company to go on carrying on business and the charge to remain a floating charge as concerns other assets: *Robson* v. *Smith.* (1) The claimant could not by merely giving notice of his charge obtain a right to prevent the garnishee order nisi being made absolute, for he did not by giving such a notice obtain an interest by way of charge in the debt garnished. The judgment creditor obtains by virtue of the garnishee order nisi an inchoate interest in the nature of a charge in the garnished debt, although the property in the debt is not transferred to him: *Galbraith* v. *Grimshaw & Baxter* (2); and the debenture-holder in such a case as the present has no right to prevent the garnishee order being made absolute. If the order is made absolute before the debenture-holder makes his charge specific as to all the assets of the company, the rights of the judgment creditor must prevail. [They also cited *In re Florence Land and Public Works Co.* (3); *Holroyd* v. *Marshall* (4); *Tailby* v. *Official Receiver* (5); *In re Standard Manufacturing Co.* (6); *In re Opera, Limited* (7); *Brunton* v. *Electrical Engineering Corporation* (8); *Davis* v. *Freethy* (9);

(1) [1895] 2 Ch. 118, per Romer J.
(2) [1910] 1 K. B. 339.
(3) (1878) 10 Ch. D. 530.
(4) (1862) 10 H. L. C. 191.
(5) (1888) 13 App. Cas. 523.
(6) [1891] 1 Ch. 627.
(7) [1891] 3 Ch. 260.
(8) [1892] 1 Ch. 434.
(9) (1890) 24 Q. B. D. 519.

Illingworth v. *Houldsworth* (1); *Geisse* v. *Taylor* (2); *Norton* v. *Yates* (3); *Ex parte Joselyne* (4); *Cairney* v. *Back* (5); *Badeley* v. *Consolidated Bank* (6); *Davey & Co.* v. *Williamson & Sons* (7); *Simultaneous Colour Printing Syndicate* v. *Foweraker* (8); *Taunton* v. *Sheriff of Warwickshire* (9); *Duck* v. *Tower Galvanizing Co.* (10); *Nelson & Co.* v. *Faber & Co.* (11); *In re London Pressed Hinge Co.* (12)]

Montague Shearman, K.C., and *Farleigh*, for the debenture-holder. The law on the subject of floating securities is settled by the cases of *In re Standard Manufacturing Co.* (13) and *In re Opera, Limited.* (14) The equity of the debenture-holder is a floating charge which attaches at once to any specific property without the necessity of appointing a receiver or manager of the company's business; in other words, the debenture-holder can intervene in the management without appointing a manager. At any moment he can intervene and say that a specific asset is his; he can determine the licence to carry on the business by means of that asset. Such a debenture paralyses every execution; that is the result of *In re Standard Manufacturing Co.* (13) and other authorities; in particular, the cases of *Davey & Co.* v. *Williamson & Sons* (7) and *Simultaneous Colour Printing Syndicate* v. *Foweraker* (8) shew the length to which the Courts have gone in that direction. It is wrong to say that the asset so claimed by the debenture-holder is not specific: *In re Standard Manufacturing Co.* (13); that case shews that the question does not depend upon whether or not a receiver has been appointed; and in the subsequent case of *In re Opera, Limited* (14) no point was made of the non-appointment of a receiver. It is the generally accepted view that from the outset the debenture-holder has a charge something beyond a mere equity; if he gives the company a licence to trade, he cannot, of course, quarrel with

(1) [1903] 2 Ch. 284; [1904] A. C. 355.
(2) [1905] 2 K. B. 658.
(3) [1906] 1 K. B. 112.
(4) (1878) 8 Ch. D. 327.
(5) [1906] 2 K. B. 746.
(6) (1886) 34 Ch. D. 536.
(7) [1898] 2 Q. B. 194.
(8) [1901] 1 K. B. 771.
(9) [1895] 2 Ch. 319.
(10) [1901] 2 K. B. 314.
(11) [1903] 2 K. B. 367.
(12) [1905] 1 Ch. 576.
(13) [1891] 1 Ch. 627.
(14) [1891] 3 Ch. 260.

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what the company does, but he can interfere with what others seek to do to the company.

[BUCKLEY L.J. Could the holder of a floating security write to the company's bankers and forbid them to honour any more of the company's cheques?]

Yes; that is a right which comes within the principles of law enunciated by Lord Macnaghten in *Governments Stock Investment Co.* v. *Manila Ry. Co.* (1) *Davey & Co.* v. *Williamson & Sons* (2) is strong to shew that where goods seized in execution are validly charged with the payment of debentures there is no interest of the company in them which is available to satisfy the judgment debt.

[VAUGHAN WILLIAMS L.J. The judgment in that case is open to the remark that the Court was wrong in saying that in *In re Standard Manufacturing Co.* (3) and *In re Opera, Limited* (4) the rights of the debenture-holder had not crystallized; they had in fact crystallized in each case.]

In the case of *In re London Pressed Hinge Co.* (5) Buckley J. gave the same interpretation to those two decisions that it is now submitted is the right one. The later cases of *Norton* v. *Yates* (6) and *Cairney* v. *Back* (7) merely develop the same principle. A creditor who has merely a garnishee order nisi gets no charge on the debt which he seeks to attach.

[BUCKLEY L.J. The substantial point is whether the debenture-holder can stop the company from dealing with one particular asset without stopping their whole business.]

It is submitted that he can; for instance, he could interfere with their using their banking account without interfering with their conduct of their business. The principle running through the latest authorities is that debenture-holders have always a charge on the company's assets, and that a hostile party seeking to enforce payment of a debt owing to him by the company cannot get priority over the debenture-holders. In the present case the company bound itself to pay on demand the money

(1) [1897] A. C. 81.
(2) [1898] 2 Q. B. 194.
(3) [1891] 1 Ch. 627.
(4) [1891] 3 Ch. 260.
(5) [1905] 1 Ch. 576.
(6) [1906] 1 K. B. 112.
(7) [1906] 2 K. B. 746.

secured by the debenture, and the demand of payment which was in fact made amounted to a crystallization of the security. *Holroyd* v. *Marshall* (1) shews that as soon as future goods were acquired the beneficial interest in them passed to the mortgagee, although the mortgagor had a licence from him to carry on his business in the ordinary way.

A. S. Carr in reply. In *Nelson & Co.* v. *Faber & Co.* (2) Joyce J. points out that there are three ways in which a floating security may become an active security, namely, the company may be wound up, or it may cease carrying on business, or a receiver may be appointed at the instance of the debenture-holders; none of those events has occurred in the present case. *Robson* v. *Smith* (3) is a clear authority that a notice by the holder of a floating security requiring payment to himself of a debt owing to the company is not one of the ways in which his security can be enforced; and it is a plain inference from *Governments Stock Investment Co.* v. *Manila Ry. Co.* (4) that a demand of payment of money due on a debenture constituting a floating security is not enough to crystallize the security and turn it into a fixed charge.

VAUGHAN WILLIAMS L.J. In this case there was an application in the county court to make absolute a garnishee order nisi; the county court judge made it absolute, and on appeal to the Divisional Court the order of the county court was discharged. The question for our decision, therefore, is not what effect the garnishee order absolute would have if made, but whether it ought to be made at all. I have come to the conclusion that it ought to be made absolute.

The question necessarily depends upon the effect of the debenture itself, which gives the debenture-holder from the moment of its execution a floating charge over the company's assets, and we have to say what was the effect of giving this floating charge. On the one hand it is said that, when a creditor has a floating charge, it gives him such rights over the company's assets that, if an execution were put in upon the company's goods

(1) 10 H. L. C. 191.
(2) [1903] 2 K. B. 367.
(3) [1895] 2 Ch. 118.
(4) [1897] A. C. 81.

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and chattels, it could not be enforced and ought to be stopped. The execution creditor, on the other hand, while not denying that a debenture of this kind gives some immediate rights to the debenture-holder, nor that the latter might immediately upon execution being put in bring an action asking for effect to be given to his equitable rights, contends that while it is true that the debenture-holder gets an equity by the mere execution of the instrument, yet that this is one of those instruments of charge in which it is contemplated and intended by all parties that after the actual issue of the debenture the company shall be able to carry on its business and to deal with the property which is the subject of the debenture for the purposes of its business; that it shall have power to sell its goods, power to vary its assets from day to day; in short, the power and right to manage its business without any interference from the debenture-holder that might prevent in any way the carrying on of its business effectively. It is said that, although in one sense the debenture-holder gets an immediate equity or charge on the assets of the company, it was not intended that he should exercise it by enforcing his security so long as he allowed the company to carry on its business in the ordinary way. That being so, it is said in reply that such instruments usually provide for various occasions on the happening of which the right of the company, or the licence given to the company, to carry on its business shall come to an end. Generally that right is determined by the happening of something which entitles the making of an application to the Court for the appointment of a receiver. This is a case in which a receiver could be appointed without an order of the Court; it is not a case in which persons claiming to be secured creditors could exercise the full rights of legal mortgagees. But it is a case in which, when an occasion arises for entirely putting an end to the company's jus disponendi, an application may be made to the Court for the appointment of a receiver. In my opinion, unless something has occurred entitling the debenture-holders to make such an application, and the application has in fact been made for the appointment of a receiver, or an action brought by them or on their behalf to realize their security, or unless something has happened which

entitles the debenture-holders to determine their licence to the company to carry on their business and they have actually done so, the company is entitled to do all the things which the licence entitles them to do. It is admitted that in the present case the debenture-holder allowed the company to carry on its business, to make contracts, and to pay its debts; but it is said that, though it is entitled to carry on business and has incurred debts in carrying it on, and although it might take upon itself to pay a particular debt and sell the assets of the company to enable its payment, yet, if the debt were paid by the machinery of an execution by the sheriff completed by seizure and sale of the company's goods, the execution creditor would have to return the money.

In this case there was no sale by the sheriff, and we have not to decide what would have been the effect if there had been one. Speaking for myself, I follow the view taken by Channell J. in *Robinson* v. *Burnell's Vienna Bakery Co.* (1), in which there was not an actual sale by the sheriff, but a seizure of the goods by him and a compulsion of payment, payments being made by the company to the sheriff in order to avoid a sale. In his judgment Channell J. said: "The debenture-holders were the holders of a floating security over the assets of the company, and no doubt when the company's goods were taken in execution by the sheriff they were only seized subject to the equities attaching to them, and the title of the debenture-holders would have prevailed had it been perfected in time. I express no opinion upon the point whether, if the debenture-holder, or the receiver on his behalf, does not interfere until the execution is completed and the execution creditor has got the money in his own hands, his interference would be too late; the question does not arise in the present case. What clearly happened in the present case was that there was part payment by the company, the execution debtors, on account of their debt made whilst they were still carrying on business and with the view of enabling them to continue to carry it on. It is true that the payments of instalments of their debt by the defendants were made under pressure of the execution that had been levied by the sheriff; but

(1) [1904] 2 K. B. 624.

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does that fact by itself bring into force the debenture-holder's security? Does it determine the licence to the company to carry on their business in the ordinary way so as to make the company's property the property of the debenture-holder, and to enable him to say that the instalments are being paid with his money? That is what must be made out in order to enable the debenture-holder to succeed in his claim, and it has not been made out to my satisfaction. I think that *Robson* v. *Smith* (1) is an authority for the proposition that if the money is paid in payment of a debt, or as an instalment of a debt, it does not signify if it is paid under pressure; and if that is a correct view of that decision, it covers the point which I should otherwise have had to thrash out for myself." Under the circumstances of the present case it seems to me that there is authority for saying that, whatever the ultimate result may be, it is impossible, if that decision is right, to say that an execution may not be enforced so long as the debenture-holders have not got a receiver appointed or have not done something in regard to the licence to the company to continue carrying on its business.

It would serve no useful purpose to refer to all the decisions that have been cited to us. But without going through them, I may say two things about them. The earliest judgments on the rights of debenture-holders, which are set out in a convenient form by North J. in *Wheatley* v. *Silkstone and Haigh Moor Coal Co.* (2), were given on the basis that debenture-holders, in order to enforce their equity against the assets of a company, which were the subject-matter of that equity, had in some shape to determine the licence to carry on business which by necessary implication was a part of the bargain between themselves and the company. North J. begins by citing as the earliest decision *In re Panama, New Zealand, and Australian Royal Mail Co.* (3), and quotes the following language of Giffard L.J. in his judgment in that case:— "I take the object and meaning of the debenture to be this, that the word 'undertaking' necessarily infers that the company will go on, and that the debenture-holder could not

(1) [1895] 2 Ch. 118. (2) (1885) 29 Ch. D. 715.
(3) (1870) L. R. 5 Ch. 318.

interfere until either the interest which was due was unpaid, or until the period had arrived for the payment of his principal, and that principal was unpaid. I think the meaning and object of the security was this, that the company might go on during that interval, and, furthermore, that during the interval the debenture-holder would not be entitled to any account of mesne profits, or of any dealing with the property of the company in the ordinary course of carrying on their business."

I may here say one word on *Robson* v. *Smith*. (1) In that case Romer J. says (2): "The holder of a debenture constituting a floating security only while the company is carrying on its business, and when no steps have been taken to wind up the company or to get a receiver appointed, cannot single out a particular debt due to the company and require by notice that debt to be paid to him or not to be paid to the company or to those validly claiming through the company." In this particular case the debenture-holder, not having chosen to do anything or to interfere in any way, cannot come forward and intervene in this execution by opposing the making of the garnishee order absolute, and cannot by so doing prevent the payment of the creditors of the company; he has indeed attempted to do exactly that which Romer J. pointed out the holder of such a debenture could not do. In point of fact, the position of the debenture-holder when opposing the application to make the garnishee order absolute may be described in two ways. First, it may be said that the debenture-holder, though he has in no way interrupted the licence, that is the jus, of the company to carry on their business, wishes to interfere with their mode of dealing with a particular debt; in other words, the debenture-holder is willing that the company should continue to carry on its business, but wishes to arrogate to himself the right to prevent a particular debt from being paid; he says it should not be paid because it would not be a voluntary payment, but would be made under the order of the Court just as much as where a sheriff puts in execution on a judgment. In my opinion nothing has happened in the present case to prevent the execution creditor from obtaining a garnishee order absolute,

(1) [1895] 2 Ch. 118. (2) [1895] 2 Ch. at p. 126.

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for although it may be that to-morrow there will be a receiver, at present there is nothing of the sort.

I cannot conclude my judgment without making a citation from the speech of Lord Macnaghten in the case of *Governments Stock Investment Co.* v. *Manila Ry. Co.* (1) He says: "A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes. His right to intervene may of course be suspended by agreement. But if there is no agreement for suspension, he may exercise his right whenever he pleases after default." That passage is not only consistent with my observations, but necessarily leads to my conclusions.

I have dealt with the position which the debenture-holder takes up when he seeks to intervene in the affairs of the company without interrupting their licence to carry on their business. The other view put forward by the debenture-holder, if right, would lead to this result: that, although he had nothing more than an ordinary debenture and the company was in fact carrying on business, an execution levied upon the company's goods and chattels might without more be at once made void at the mere option of the debenture-holder. The result of this would be an absolute immunity of the company from executions, if the debenture-holder so chose.

Under these circumstances, what is the result of the present case? Mr. Shearman does not contend that the precise point has ever been decided. Many cases have been cited, all of which more or less flow from *In re Standard Manufacturing Co.* (2) and *In re Opera, Limited* (3), though it is not contended that either of those decisions is decisive of the present case. I am aware that that concession proceeded largely on the ground that in each of those cases the circumstances were such that the execution could have been defeated by the debenture-holder by reason of the

(1) [1897] A. C. at p. 86. (2) [1891] 1 Ch. 627.
(3) [1891] 3 Ch. 260.

fact that before any sale had been effected circumstances had happened which entitled him to determine the right of the company to carry on business. Under the circumstances, I see nothing to prevent the Court from basing its decision on the definition of the position of debenture-holders in respect of floating securities contained in the earlier cases referred to in the judgment of North J. in *Wheatley* v. *Silkstone and Haigh Moor Coal Co.* (1), and not only basing their decision on what is there laid down, but arriving at a conclusion which may, and I hope will, result in preventing any further extension of evil results from the admitted power of debenture-holders.

I only wish to add that in referring to some only of the decisions I must not be supposed to be ignoring others which lead to the same conclusion. I may cite *Taunton* v. *Sheriff of Warwickshire* (2), in which the judgments of Lindley L.J. and Kay L.J. are in accord with my own view. I think that this appeal must be allowed, and the garnishee order nisi made absolute.

FLETCHER MOULTON L.J. We have had the advantage of an able argument and of the citation of a large number of cases. Some of them, I think, were not worthy of being cited, and I do not propose to go through the whole of them. But the question for our decision relates to the powers of the holders of debentures of companies, and raises a question of importance, and I must refer to some decisions in order to justify the conclusions at which I have arrived.

The facts are shortly these. In November, 1908, William Evans recovered judgment in the county court against the company for 86*l.* 1*s.* 8*d.* In April, 1909, not having received payment, Evans obtained a garnishee order nisi against the banking account of the company with the North and South Wales Bank, the garnishees. The application for the order to be made absolute was opposed by Pitman, the claimant, on the ground that he was the owner of a debenture which included the whole of the company's property, past and future, its undertaking, goodwill, and everything that it possessed. At

(1) 29 Ch. D. 715. (2) [1895] 2 Ch. 319.

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the hearing the county court judge found for the plaintiff and made the garnishee order absolute. Upon appeal the Divisional Court set aside the order, holding that the plaintiff had not shewn sufficient grounds for his application; hence the appeal to this Court. The sole ground of opposition to the application to the county court judge was the possession by Pitman of this debenture.

I need not go at length into the terms of the debenture. It is common ground that a large sum was presently payable under the debenture, and that the debenture gave to a receiver appointed under it power to enter into possession of the company's property without any application to the Court for leave so to do, so that the debenture-holder, had he chosen to do so, could have appointed a receiver, and through him have taken possession of the company's assets. The question for our decision is whether the mere existence of this debenture, without the holder's taking any step by way of acting upon it by appointing a receiver to take possession of the assets, affords sufficient ground for the refusal to make the garnishee order absolute.

This question compels us to examine the exact nature of the rights of the holder of such a debenture. The language of clause 2 of the debenture establishes beyond a doubt that this debenture is what is termed a floating security. The effect of these floating securities, which came into existence by reason of the growth of joint stock companies, has been frequently considered. Many years back the attention of the Courts was drawn to their peculiar nature, and important decisions were given as to the rights which they conferred. Reference has been made to three decisions, which I think were the earliest—*In re Panama, New Zealand, and Australian Royal Mail Co.* (1), *In re Florence Land and Public Works Co.* (2), and *In re Colonial Trusts Corporation.* (3) They were all considered by North J. in his judgment in *Wheatley* v. *Silkstone and Haigh Moor Coal Co.* (4) In all these decisions the Courts realized that in the case of a security of this

(1) L. R. 5 Ch. 318.
(2) 10 Ch. D. 530.
(3) (1879) 15 Ch. D. 465.
(4) 29 Ch. D. 715.

nature it was impossible to come to any other conclusion than that it was intended to leave the company free to carry on its business until the time arrived when the debenture-holders enforced their security upon the company's assets and undertaking. I do not deny that in the earlier cases the actual words of the particular document may have influenced the Courts and enabled them to draw the conclusions which they did. But at an early period it became clear to judges that this conclusion did not depend upon the special language used in the particular document, but upon the essence and nature of a security of this kind. This view is expressly accepted in later decisions and is now accepted law," and accordingly in ascertaining the effect which I ought to give to such a security I prefer to rely on the language of Lord Macnaghten in *Governments Stock Investment Co.* v. *Manila Ry. Co.* (1), and of Lord Halsbury and Lord Macnaghten a few years later in *Illingworth* v. *Houldsworth* (2), in laying down what are the fundamental characteristics of such a security. In the former case Lord Macnaghten says (3): "A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes. His right to intervene may of course be suspended by agreement. But if there is no agreement for suspension, he may exercise his right whenever he pleases after default." I call attention to the fact that Lord Macnaghten there lays down that that which changes the character of a floating security to that of a fixed charge is either the cessation of the carrying on of business by the company or the actual intervention of the debenture-holder, but not his mere right to intervene. Mere default on the part of the company does not change the character of the security; the debenture-holder must actually intervene. This description of a floating charge, coming as it does from such a high authority, has been in general use in the Courts. But

(1) [1897] A. C. 81. (2) [1904] A. C. 355.
(3) [1897] A. C. at p. 86.

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criticism was passed on the use in it of the word "dormant," and in *Illingworth* v. *Houldsworth* (1) Lord Macnaghten, referring to this criticism of his definition or description, says: "With regard to the criticism which Vaughan Williams L.J. passed, not I think unkindly, on some words of mine in the *Manila Case* (2), I only wish to observe that what I said was intended as a description, not as a definition, of a floating security. I should have thought there was not much difficulty in defining what a floating charge is in contrast to what is called a specific charge. A specific charge, I think, is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp." I think that Lord Macnaghten was here keeping in view the two characteristic features of floating charges—(1.) the non-permanence of the property which is the subject of the charge, and its constant change from time to time, and (2.) that a floating charge does not of itself fasten and settle even on the property existing at the moment. This explanation removes all difficulties arising from decisions which speak of a floating charge as an existing charge. It is an existing charge, and is rightly termed so, but care must be taken to remember that it has not settled down and fastened on the property which is the subject of the charge. I find no difficulty in grasping such a concept.

Taking this as a description of such a charge, I ask myself, does the existence of such a charge prevent the sheriff from seizing the property subject to the charge, or prevent a judgment creditor from getting made absolute an order nisi which he has obtained for garnishing a debt to the company? The burden of making good his opposition lies on the owner of the charge. There are two lines of argument which are open to him, and the respondent relies on both. The first, which is the wider in its scope, and turns less on the special facts, is that the existence of such a debenture makes the property of the company at each

(1) [1904] A. C. 355, at p. 358. (2) [1897] A. C. 81.

moment property burdened with a charge, so that it cannot be seized or garnished because garnishment can only operate on the beneficial interest in property. The second line is more modest; it is not that the mere existence of the debenture affords an adequate reply to an application for a garnishee order absolute, but that in this case the debenture-holder gave notice to the bank, which had property of the company in its hands, and claimed the asset which the judgment creditor sought to garnish, on the ground that all the property of the company was pledged to the debenture-holder, and that therefore the rights of the judgment creditor were subject to the debenture-holder's prior right. I first consider the wider ground: that the existence of the debenture burdens each piece of the company's property and assets with the debenture-holder's rights and prevents the law from dealing with it in the ordinary way. The results of such a contention are astonishing; it means that by giving such a debenture a company retains the full right of trading with untied hands and at the same time obtains immunity from the operation of all processes of law. I should be slow to come to the conclusion that such an anomaly was recognized by the law. Nor do I think that it is. A consideration of the effect of floating charges and of the fact that the freedom of the company to carry on its business is not based on special words creating that freedom, but on the nature of the charge itself, leads me to the conclusion that the right of the company to carry on its business as it wills pending the enforcement of the security must mean that it may carry it on in accordance with law, including a liability to the processes of the law if it does not pay its debts. It is impossible for a Court of law to draw the inference that Parliament intended to confer upon companies complete commercial freedom without commercial responsibilities. It follows that, even if this matter were res integra, and I were drawing the necessary inferences from the nature of the security itself, I should say that the first line of the claimant's defence entirely breaks down.

In order to support this line of argument, appeal has been made to a series of authorities which were said by Mr. Shearman to

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cover the point. I have read all the cases, two of which, *In re Standard Manufacturing Co.* (1) and *In re Opera, Limited* (2), were placed in the forefront by Mr. Shearman as having the authority attaching to decisions of the Court of Appeal and as establishing his position. In my opinion neither case helps him at all. They were both cases of execution, but no distinction can be drawn for this purpose between execution and garnishee proceedings. The sheriff had seized goods of the company, over which there were floating charges in the shape of debentures; the debenture-holders claimed the goods as being subject to the charge and claimed to be possessed of an equity of a higher nature than the rights of the execution creditor. So far there is a resemblance, and if these were all the facts these decisions might be of assistance to the debenture-holder in the present case. But in each of these cases there is the all-important fact that before the sale of the goods the debenture-holders turned their floating charge into a fixed charge affecting the goods themselves. In these cases the conversion of the charge into a fixed security took place, it is true, after the seizure of the goods, but it was not by reason of a charge then and there created, but by reason of a change in the operation of a charge which had existed long before. These cases shew that a floating charge is a real charge, for it must be regarded as itself existing before the new rights came into existence. They recognize also the power to change a floating into a fixed charge by taking the proper steps. When in these cases the goods were seized in execution, the goods were not by such seizure finally alienated from the company (for the company might have paid out the execution), so that time was left for the rights of the debenture-holders to develop into a fixed charge on the goods. This was effected before the sheriff could sell, and therefore the goods could only be dealt with subject to the equities of the debenture-holders. Neither case justifies the contention that the mere existence of a debenture is an answer to the claim of a judgment creditor that his execution should be allowed to proceed or that he is entitled to a garnishee order absolute.

(1) [1891] 1 Ch. 627. (2) [1891] 3 Ch. 260.

There are two other cases which were relied on by Mr. Shearman to which I must here refer. The first of them is *Davey & Co.* v. *Williamson & Sons.* (1) This was a very peculiar case, in which conclusions based upon the special language of the trust deed are mixed with conclusions derived from more general principles of law. I must confess that I have great difficulty in understanding the ground of the decision. I incline to think that the Court considered that the floating charge had ripened into a fixed charge because the company had ceased to carry on business, so that there was ground for contending that a change in the character of the charge had taken place. But I am not prepared to say that this was certainly the ground of the decision. We are, however, not bound by that decision, and if it means that the mere existence of the debenture was an answer to the claim of the execution creditor it was in my opinion wrongly decided. The last paragraph of the judgment weakens the authority of the case, for the statement that in the case of *In re Standard Manufacturing Co.* (2) the rights of the debenture-holders had not crystallized is erroneous. The other case, which I need do no more than mention, is *Cairney* v. *Back* (3), which contains dicta that I cannot reconcile with what I believe to be the law.

I now turn to the second and more modest line of argument, which is that, assuming that the debenture-holder in order to get priority must have turned his charge from a floating charge into a specific charge on the company's assets, he has done so in this case, because he gave a notice to the bank not to pay the judgment creditor and claimed the balance lying at the bank. In my opinion that argument is fallacious. A security of this kind must be either floating or fixed. While it is a floating security the company has a right, not a mere licence, to carry on its business until the debenture-holder intervenes, and when the debenture-holder does intervene he must do so with the intention of making his security a fixed security. In my opinion it is a breach of contract on the part of the debenture-holder to interfere in the conduct of the business so long as his security is

(1) [1898] 2 Q. B. 194. (2) [1891] 1 Ch. 627.
(3) [1906] 2 K. B. 746.

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only a floating security; for example, he cannot say to the company that they may pay A. but not B., and that the money which otherwise they would pay to B. must be paid to the debenture-holder himself. Such a right in the debenture-holder would be wholly inconsistent with the right of the company to carry on its business. If authority be wanted, Romer J. deals with the point in *Robson* v. *Smith* (1), where he says, "The holder of a debenture constituting a floating security only while the company is carrying on its business, and when no steps have been taken to wind up the company or to get a receiver appointed, cannot single out a particular debt due to the company and require by notice that debt to be paid to him or not to be paid to the company or to those validly claiming through the company." That is thoroughly sound law. It is inconsistent with the nature of a floating security that the holder should be able to pounce down on particular assets and to interfere with the company's business while still keeping his security a floating security; he cannot at once give freedom and insist on servitude. Therefore the giving of the notice to the bank did not amount to a change from a floating to a fixed charge; it gave the debenture-holder no more right than he would have had if it had not been given.

The sole question in this case is whether the decision of the county court judge was right; I am of opinion that it was, and that he was bound to make absolute the garnishee order nisi. This appeal, therefore, must be allowed.

BUCKLEY L.J. I agree that the appellant is entitled to succeed. To a large part of the respondent's argument I assent. Mr. Shearman's contention as to the law found in *In re Standard Manufacturing Co.* (2) and *In re Opera, Limited* (3) is to my mind correct. As a judge of first instance I stated my views on this subject in *In re London Pressed Hinge Co.* (4), and I adhere to all that I there said. I there pointed out that I arrived at my conclusion upon the authority of those two decisions in the Court of Appeal. I think it right that the law should be certain, and

(1) [1895] 2 Ch. 118, at p. 126.
(2) [1891] 1 Ch. 627.
(3) [1891] 3 Ch. 260.
(4) [1905] 1 Ch. 576.

that a decision should not be reviewed by a Court of co-ordinate jurisdiction. This Court is as much bound as the Court below by the decisions in *In re Standard Manufacturing Co.* (1) and *In re Opera, Limited.* (2) Effect must be given to those decisions, and none the less because they involve consequences which, as I indicated, I deplore. The result of those cases is that, as between an execution creditor and a debenture-holder who possesses a floating charge, the execution creditor takes subject to the equity of the debenture-holder. The point of the present case lies in determining what that equity is. Mr. Shearman's contention that the execution creditor takes subject to the equitable charge is not in my opinion right; the true view is that he takes subject to such equitable rights as an equitable charge of this kind confers.

The nature of a floating security has been discussed and described in *In re Florence Land and Public Works Co.* (3), *Simultaneous Colour Printing Syndicate* v. *Foweraker* (4), *Governments Stock Investment Co.* v. *Manila Ry. Co.* (5), *Illingworth* v. *Houldsworth* (6), and other cases. The outcome of the decisions may be thus summarized. A floating security is not a future security; it is a present security, which presently affects all the assets of the company expressed to be included in it. On the other hand, it is not a specific security; the holder cannot affirm that the assets are specifically mortgaged to him. The assets are mortgaged in such a way that the mortgagor can deal with them without the concurrence of the mortgagee. A floating security is not a specific mortgage of the assets, plus a licence to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallize into a fixed security. Mr. Shearman argued that it was competent to the mortgagee to intervene at any moment and to say that he withdrew the licence as regards any particular item. That is not

(1) [1891] 1 Ch. 627.
(2) [1891] 3 Ch. 260.
(3) 10 Ch. D. 530.
(4) [1901] 1 K. B. 771.
(5) [1897] A. C. 81.
(6) [1904] A. C. 355.

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in my opinion the nature of the security; it is a mortgage presently affecting all the items expressed to be included in it, but not specifically affecting any item till the happening of the event which causes the security to crystallize as regards all the items. This crystallization may be brought about in various ways. A receiver may be appointed, or the company may go into liquidation and a liquidator be appointed, or any event may happen which is defined as bringing to an end the licence to the company to carry on business. There is no case in which it has been affirmed that a mortgagee of this description may at any moment forbid the company to sell a particular piece of property or may take it himself and keep it, and leave the licence to carry on the business subsisting as regards everything else. This would be inconsistent with the real bargain between the parties, which is that the mortgagee gives authority to the company to use all its property until the licence to carry on business comes to an end. It is impossible to evolve from the contractual relation between a company and its debenture-holders the proposition for instance that the latter may serve a notice on the company's bankers with regard to the honouring of the company's cheques and still say that, although he had stopped payment of the company's cheques, he was not interfering with the carrying on of the company's business. Such a contention would be inconsistent with the true relation between the parties.

When the cases cited on behalf of the debenture-holder are examined, there is apparent in all of them some circumstance by reason of which the freedom of the company to carry on business has come to an end. The first is *Davey & Co.* v. *Williamson & Sons.* (1) I have no fault to find with the decision. In that case the debentures were a security for money payable at a date which had not arrived, and the trust deed contained an authority to the company to carry on its business until the happening of one or more of certain events upon which the security became enforceable; one of those events was the suing out of an execution against the property of the company, and that event had happened; it resulted, therefore, that the authority of the

(1) [1898] 2 Q. B. 194.

company to carry on business was at an end, and it could no longer deal with the property comprised in the security as though the security were not in existence. The floating charge had become a specific security on all the assets of the company; it was specific as between the execution creditor and the debenture-holders, and the latter succeeded in their claim to the goods. In *Geisse* v. *Taylor* (1) execution had been put in by a garnishor against garnishees, a limited company, who, after the making of the garnishee order but before the execution, had issued a debenture, covering all their assets and property, to secure repayment of a loan. Upon execution being put in, the debenture-holder appointed a receiver and claimed the goods under his debenture. It was there held that the security had become specific and that the debenture-holder was entitled to succeed. In *Norton* v. *Yates* (2) judgment was obtained against a company, and on the same day the judgment creditor obtained and served a garnishee order nisi upon garnishees; two days later a receiver and manager was appointed in a debenture-holders' action; it was held that the security had become specific, and that the receiver was entitled to the money in priority to the judgment creditor. In *Cairney* v. *Back* (3) judgment had been obtained against a company on June 15, and a garnishee order nisi served on the company's bankers on the same day; on June 25 the garnishee order was made absolute, and on June 29 a receiver was appointed by a debenture-holder under the powers contained in his debenture. The garnishee order absolute had not resulted in seizure, and it was held that, as the garnishee order absolute did not transfer to the garnishor the property in the garnished debt, the debenture-holder was entitled to the money in priority to the judgment creditor. Then came *In re London Pressed Hinge Co.* (4), which was an application for the appointment of a receiver, and I felt myself bound to hold that the debenture-holders were entitled to succeed in their application. In all these cases either the security had already crystallized, or there was an application to crystallize it.

Two cases have been cited to us which are unquestionably in

(1) [1905] 2 K. B. 658.
(2) [1906] 1 K. B. 112.
(3) [1906] 2 K. B. 746.
(4) [1905] 1 Ch. 576.

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favour of the execution creditor. In *Robson* v. *Smith* (1) a receiver had not been appointed by the debenture-holder, and Romer J. held that the debenture-holder could not require by notice that a particular debt owing to the company should be paid to him and not to the company. In *Robinson* v. *Burnell's Vienna Bakery Co.* (2) execution had been put in against the company, and with the assent of the execution creditor the company paid daily to the sheriff a certain sum out of their daily takings; afterwards a receiver was appointed in a debenture-holders' action, and the question arose whether he was entitled to the money in the hands of the sheriff which had not been handed over by him to the execution creditor. Channell J. held that the payment of the money to the sheriff was equivalent to payment to the execution creditor, who was entitled to retain it as against the debenture-holders.

In the result there is nothing to prevent us from affirming the following proposition: notwithstanding the law laid down in *In re Standard Manufacturing Co.* (3) and in *In re Opera, Limited* (4), that the execution creditor takes subject to the equity of the debenture-holders, no equity arises in a debenture-holder, whose security is a floating charge, from his merely giving notice to seize a particular asset of the company; he must do something to turn his security from a floating into a fixed charge. The cases of *In re Standard Manufacturing Co.* (3) and *In re Opera, Limited* (4) are, of course, binding upon us, but they do not in any way conflict with our decision. Our judgment must be in favour of the appellant.

Appeal allowed.

Solicitors for the judgment creditor: *R. Raphael & Co.*
Solicitors for the debenture-holder: *Huntley & Son.*

(1) [1895] 2 Ch. 118.
(2) [1904] 2 K. B. 624.
(3) [1891] 1 Ch. 627.
(4) [1891] 3 Ch. 260.

W. J. B.

[IN THE COURT OF APPEAL.]

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May 3, 4; *June* 21.

WALLIS, SON & WELLS *v.* PRATT & HAYNES.

Sale of Goods—Delivery of Goods not of Contract Description—Resale by Purchaser—Condition—Warranty—Exclusion by Terms of Contract of Liability for Breach of Warranty.

The defendants sold seed by sample to the plaintiffs, the terms of the sale as expressed in the sold note being that they sold on the conditions printed on the back of the note about 27½ quarters common English sainfoin at forty shillings. The material condition on the back of the sale note ran: "Sellers give no warranty express or implied as to growth, description, or any other matters . . . ." Seed equal to sample was delivered under the contract, and a portion of it was resold by the plaintiffs as common English sainfoin. The seed delivered was not, nor was the sample, common English sainfoin; they were both the seed of giant sainfoin, which was of inferior quality to that contracted for. The difference between the two seeds was indistinguishable, and the mistake was only discovered by the plaintiffs' sub-purchaser when the seed sown by him came up. The plaintiffs reasonably and properly settled a claim for damages brought against them by their sub-purchaser, and now claimed to recover from the defendants the amount so paid:—

Held by Vaughan Williams L.J. and Farwell L.J. (Fletcher Moulton L.J. dissenting), that the plaintiffs, having accepted and resold the seed, had put it out of their power to treat the description of the article sold as common English sainfoin as a condition, on a breach of which they were entitled to reject the goods, and could only treat it as a warranty, a breach of which would ordinarily entitle the purchaser to damages; but that upon the true construction of the condition printed on the back of the sold note the defendants had excluded all liability capable of enforcement by an action for breach of warranty.

Howcroft v. *Laycock*, (1898) 14 Times L. R. 460, overruled.

Appeal from the decision of Bray J. on a special case stated by an arbitrator under the provisions of the Arbitration Act, 1889, which was in substance as follows.

On February 12, 1906, Mr. Smith, a partner in the firm of Wallis, Son & Wells, met Mr. Haynes, a partner in the firm of Pratt & Haynes, on the Corn Exchange, Mark Lane. Mr. Haynes produced a sample of seed which he said was common English sainfoin, grown by Walker, of Tanfield, near Alvescot. After examining the sample, Mr. Smith asked Mr. Haynes whether he was quite sure that it was common English sainfoin, and the latter replied that it was. Thereupon Mr. Smith agreed to buy

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27½ quarters of the seed at 40*s.* a quarter, and Mr. Haynes handed to him the following sold note:—"Sold to Messrs. Wallis, Son & Wells, Reading, on the conditions printed on the back, about 27½ quarters sainfoin 40*s.* ex Walker (common English) ex Alvescot. Buyers' trucks. Due net cash on . . . . Pratt & Haynes." Of the conditions printed on the back of the sold note the second alone was material; it was in the following terms:—"Sellers give no warranty express or implied as to growth, description, or any other matters, and they shall not be held to guarantee or warrant the fitness for any particular purpose of any grain, seed, flour, cake, or any other article sold by them, or its freedom from injurious quality or from latent defect." The seed was delivered in due course and was equal to sample, and on March 26, 1906, the defendants (1) sent an invoice of the price to the plaintiffs. (1) The plaintiffs resold the seed as common English sainfoin seed in different parcels to several purchasers, including one J. R. Nichol. Neither the sample nor the bulk was common English sainfoin seed; both were the seed of the giant sainfoin. The two seeds are indistinguishable, at all events by any examination of a sample which is practicable in the course of a deal. The plants raised by sowing the two seeds differ in the following respects:—Giant sainfoin is coarser and grows taller than common English; it does not cover the ground so well; if allowed to do so, it comes to seed twice in the year, and is of little (if any) use for feeding purposes after the third year from sowing. Common English sainfoin "tillers out" better. It only seeds once in each year, and lasts for six, seven, or even eight years. By reason of these differences the price of common English sainfoin seed is about 10*s.* a quarter higher than that of giant sainfoin seed.

The seed sold by the plaintiffs to Nichol was sown by him and in due time came up. He then for the first time discovered that the seed supplied to him was not that of common English sainfoin, but was that of giant sainfoin; he communicated this fact to the plaintiffs, who then for the first time became aware of

(1) To avoid risk of confusion, the buyers are styled "plaintiffs" and the sellers "defendants" throughout this report, although the proceedings were by arbitration and not by action.

it. Nichol then made a claim for breach of warranty against the plaintiffs, which was reasonably and properly settled by them, after due notice to the defendants, for 14*l.* Other similar claims were made on the plaintiffs by other purchasers and were settled, or were in process of being settled by them. The plaintiffs claimed against the defendants the sum of 14*l.* so paid to Nichol, which sum the defendants refused to pay; the dispute was referred to an arbitrator, who at the request of the defendants made his award in the form of a special case, as it was desired to have the true construction of the second condition authoritatively determined.

It was contended on behalf of the plaintiffs (1.) that they were entitled to recover the sum of 14*l.* as damages for breach of warranty; (2.) that neither the condition on the sold note nor the invoice protected the defendants, the difference between common English sainfoin and giant sainfoin being one of kind and not merely of description or quality; and (3.) that the invoice was no part of the contract and could not be considered in determining the question between the parties.

It was contended on behalf of the defendants (1.) that the condition afforded a complete answer to the plaintiffs' claim, the difference between common English sainfoin and giant sainfoin being a difference of description within the meaning of that word as used in the condition and in s. 13 of the Sale of Goods Act, 1893; (2.) that, whether this was so or not, the fact that the bulk corresponded with the sample afforded a complete defence to the plaintiffs' claim; and (3.) that the terms of the invoice were such that, if the plaintiffs accepted the seed, they were precluded from claiming damages for a breach of warranty.

The question for the opinion of the Court was whether upon the facts stated in the special case the plaintiffs were entitled to recover against the defendants the sum of 14*l.* Bray J. gave judgment for the plaintiffs, and the defendants appealed.

Cecil Walsh, for the defendants. On the true construction of the clause in question, it is a bar to any such claim as is here made under the contract. If under a contract for the sale of goods there has been an acceptance by the purchaser of the

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goods delivered, so that the property has passed, then that which before was a condition, non-performance of which would justify a refusal to accept the goods, is only available as a warranty or collateral stipulation with regard to the character or description of the goods, the breach of which may in ordinary cases be made the subject of a claim for damages, or may be set up in diminution or extinction of the price: see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 11 (*a*), (*c*), s. 53, sub-s. 1. In this case such a claim for damages or reduction of the price is clearly barred by the terms of the contract. If, as a matter of construction, the terms of a contract are clear, there can be no question of its reasonableness or the reverse; but there is in fact nothing unreasonable in such a contract. It is often impossible to distinguish between different kinds of seed, as it was in this case, and there is nothing unreasonable in making it a term of a contract for sale of such seed that if the purchaser accepts the seed he shall take the risk. It must be presumed that this risk is taken into consideration in fixing the price. The purchaser might, no doubt, have refused to accept the seed by reason of a breach of a condition, if he had discovered that it was not of the description contracted for, but having accepted it, he cannot now claim as upon a warranty. In a case where something obviously of a different kind from the description of article contracted for is delivered to and retained by the purchaser, as, for instance, if peas were delivered when beans were contracted for, it might be a question of fact whether such delivery and acceptance must be referred to some new implied contract and not to the original contract, because it would be impossible to suppose that the parties were acting under that contract. But the same considerations do not apply in this case, where it was impossible to distinguish between the two descriptions of seed, and there is no room for an inference of a fresh implied contract where, as here, the claimants are claiming under the original contract. Such a contract as this in effect imports the old doctrine of caveat emptor. The decision in *Howcroft* v. *Laycock* (1), upon the authority of which Bray J. decided the present case, cannot be supported. The dicta in *Josling* v. *Kingsford* (2)

(1) 14 Times L. R. 460.

(2) (1863) 13 C. B. (N.S.) 447.

and *Nichol* v. *Godts* (1), which appear to have been relied on in *Howcroft* v. *Laycock* (2), apply to cases where there has been no acceptance of the goods. [He also cited *Behn* v. *Burness* (3); *Bentsen* v. *Taylor, Sons & Co.* (4); *Chanter* v. *Hopkins* (5); *Wells* v. *Hopkins* (6); *Varley* v. *Whipp* (7); *Mondel* v. *Steel* (8); *Howcroft* v. *Perkins.* (9)]

Shearman, K.C., and *Herbert Smith*, for the plaintiffs. The sole point for consideration is the construction of condition 2 of the contract and the meaning of the term "warranty" as there used. A warranty is defined in s. 62 of the Sale of Goods Act, 1893, as being "an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated." It is submitted that the word "warranty" as used in the contract means no more than a warranty as so defined, and that in the expression "sellers give no warranty" the word must be confined to the strict meaning of "warranty" and must not be held to include a "condition." It is clear that the stipulation for common English sainfoin was a condition as to kind and quality which went to the root of the contract, and a breach of which entitled the buyers to reject the goods before acceptance and to repudiate the contract; not having done so by reason of the peculiar circumstances which made it impossible to discover the breach at the time, they are nevertheless entitled to recover damages for the breach of the condition. In other words, a condition never becomes a warranty, though under certain circumstances it may become available as a warranty; it is so available in the present case. *Howcroft* v. *Laycock* (2) is a strong authority in favour of the plaintiffs' contention.

Cecil Walsh, in reply, cited *Azemar* v. *Casella* (10); *Vigers* v. *Sanderson.* (11)

Cur. adv. vult.

(1) (1854) 10 Ex. 191.
(2) 14 Times L. R. 460.
(3) (1863) 3 B. & S. 751.
(4) [1893] 2 Q. B. 274.
(5) (1838) 4 M. & W. 399, at p. 404.
(6) (1839) 5 M. & W. 7, at p. 10.
(7) [1900] 1 Q. B. 513.
(8) (1841) 8 M. & W. 858.
(9) (1900) 16 Times L. R. 217.
(10) (1867) L. R. 2 C. P. 677.
(11) [1901] 1 K. B. 608.

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June 21. VAUGHAN WILLIAMS L.J. read the following judgment:—The first question raised in this case is what are the relative rights of seller and buyer in a case where a contract of sale is conditioned to be a sale of unascertained subject-matter of a specific kind, and the delivery by the seller is not of goods of the specified kind, but of goods of a different kind, and the buyer accepts the goods (without, however, having an opportunity of ascertaining the kind or description of goods delivered) and resells them, so that he cannot return them? The second question is whether a clause in the contract of sale in the present case protects the vendors from an action for breach of warranty.

Now, as to the first question, it is plain that the failure to deliver goods of the kind or description contracted to be delivered is a failure by the seller to perform that which is a condition precedent to the enforcement by him of the contract of sale, and that the obligation on the seller to deliver goods of the contract description is an obligation the breach of which cannot be satisfied by the payment of damages. Sir Edward Vaughan Williams in his judgment in *Behn* v. *Burness* (1) points out that the true doctrine established by principle as well as authority appears to be, generally speaking, that, if such descriptive statement was intended to be a substantial part of the contract, it is to be regarded as a condition on the failure or non-performance of which the other party may, if he be so minded, repudiate the contract in toto, and so be relieved from performing his part of it, provided it has not been partially executed in his favour. If indeed he has received the whole or any substantial part of the consideration for the promise on his part, the warranty loses the character of a condition, or, to speak more properly perhaps, ceases to be available as a condition and becomes a warranty in the narrow sense of the word, namely, a stipulation by way of agreement, for the breach of which compensation must be sought in damages. He goes on to point out that according to this doctrine, if a specific thing has been sold with a warranty of its quality, under such circumstances that the property passes by the sale, the vendee, having thus benefited by the partial execution of the contract and become the

(1) 3 B. & S. 751; 32 L. J. (Q.B.) 204.

proprietor of the thing sold, cannot treat the failure of the warranty as a condition broken unless there is a special stipulation to that effect in the contract; citing *Bannerman* v. *White*. (1)

As regards the case of *Bannerman* v. *White* (1) and the conclusions of law to be deduced from that decision, I will only point out that the judgment was based upon the intention of the parties that the contract should be null and void if the hops had been treated with sulphur, and that the purchasers, not having been able to sell the hops, were in a position to repudiate and return the hops. Then follows a statement with regard to cases where the thing sold is not specific and the property has not passed by the sale, and Williams J. says the vendee may refuse to receive the thing proffered him on the ground that it does not correspond with the descriptive statement, or, in other words, that the condition expressed in the contract has not been performed, and then says, "Still if he receives the thing sold and has the enjoyment of it, he cannot afterwards treat the descriptive statement as a condition but only as an agreement for the breach of which he may bring an action to recover damages."

It seems to me that the principles there laid down govern the present case, and that, inasmuch as the purchasers have not only accepted the seed but put it out of their power to return it, they can no longer treat the descriptive statement "common English sainfoin" as a condition preliminary to the enforcement by the sellers of the contract of sale, but could only rely upon the fact that the seed is not of the kind described in the contract as a basis for deduction from the price on account of the failure of the sellers to deliver goods corresponding with the descriptive statement in the contract. I recognize that the purchasers, if they had not accepted the seed and resold, could have brought an action for the failure to deliver the goods of the description contracted for, but am of opinion that they cannot do this after they have accepted the goods and resold. Claims seem to have been made against them by the sub-purchasers to whom they resold, and they have satisfied those claims. The circumstances under which

(1) (1861) 10 C. B. (N.S.) 844.

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they did so are not before us, but dealing with this case apart from what has been called the "barring clause," I by no means say that the damages which the purchasers have to pay their sub-purchasers might not enhance the deduction from the price payable by them to the original seller.

I have thought it right to go through cases which establish the law before the passing of the Sale of Goods Act. Strictly speaking, it was unnecessary to do this, for in my opinion the Sale of Goods Act, 1893, which is a codifying Act, by s. 11, sub-s. 1 (*c*), simply enacts the law already established by the cases cited. Clause (*c*) runs thus: "Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect." In accordance with clause (*c*) and the cases on which it is based we find that as the property in specific goods has passed to the buyer the breach of the condition that the seed should be common English sainfoin seed ceases to operate as a condition and can only be treated as a breach of warranty.

We come then to the second question—what is the effect of the barring clause? The clause is in these words: "Sellers give no warranty, express or implied, as to growth, description, or any other matters, and they shall not be held to guarantee or warrant the fitness for any particular purpose of any grain, seed, flour, cake, or any other article sold by them, or its freedom from injurious quality or from latent defect." And then it is said that by reason of the barring clause in the contract the buyers cannot sue for a breach of warranty. It is essential to remember that both the condition and the warranty are simply terms of the contract of sale, and both might be aptly termed warranties, and in fact were so termed until the time arrived in the history of legal terminology when it was supposed to be more convenient to appropriate the word "warranty" to warranties which were collateral in the sense

that the breach did not go to the whole consideration, and could not therefore be relied upon as a condition precedent, and to call a term which went to the whole consideration a condition.

The buyers having accepted goods as and for goods delivered under the contract for sale and having so disposed of the goods as that the property has irrevocably passed to them and they cannot return the goods of which they have had the benefit by possession and sub-sale, the result is that they have no longer the remedy of rejecting the goods which are not of the kind conditioned, and treating the contract as repudiated by the sellers, but only the remedy by action for breach of warranty in the narrow sense. I think that the only remedy for the breach of a term of the contract is an action for breach, and that such an action is barred as falling within the words "The sellers give no warranty, express or implied, as to growth, description, or other matters." In other words, I think that the decision of his Honour Judge Lumley Smith in *Howcroft* v. *Laycock* (1) that the non-guarantee clause protected the vendors was right, and that the decision in the Divisional Court reversing him was wrong. The words "no warranty" include every term in the contract. The fact that the one remedy consequent on the breach by the sellers to fulfil a term is no longer available after the property has passed does not obliterate that term from the contract; nor do I think that the application of the clause to "grain, flour, cake, or any other article sold" affects the construction of the word "description." I think, therefore, that we must overrule that case and allow this appeal and reverse the judgment of Bray J., which was only given because he thought he was bound to follow the decision of the Divisional Court.

FLETCHER MOULTON L.J. read the following judgment:—In this case the Court is asked to interpret a certain written contract and to state the legal consequences of its interpretation. But although the decision relates only to this particular contract, the argument has been conducted on lines turning upon general rules of law with regard to written contracts and to the meaning and effect of the provisions of the Sale of Goods Act, and I find

(1) 14 Times L. R. 460.

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it necessary therefore to deal with the points raised in connection therewith before I apply the law to the construction of the contract in question.

A party to a contract who has performed, or is ready and willing to perform, his obligations under that contract is entitled to the performance by the other contracting party of all the obligations which rest upon him. But from a very early period of our law it has been recognized that such obligations are not all of equal importance. There are some which go so directly to the substance of the contract or, in other words, are so essential to its very nature that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all. On the other hand there are other obligations which, though they must be performed, are not so vital that a failure to perform them goes to the substance of the contract. Both classes are equally obligations under the contract, and the breach of any one of them entitles the other party to damages. But in the case of the former class he has the alternative of treating the contract as being completely broken by the non-performance and (if he takes the proper steps) he can refuse to perform any of the obligations resting upon himself and sue the other party for a total failure to perform the contract. Although the decisions are fairly consistent in recognizing this distinction between the two classes of obligations under a contract there has not been a similar consistency in the nomenclature applied to them. I do not, however, propose to discuss this matter, because later usage has consecrated the term "condition" to describe an obligation of the former class and "warranty" to describe an obligation of the latter class. I do not think that the choice of terms is happy, especially so far as regards the word "condition," for it is a word which is used in many other connections and has considerable variety of meaning. But its use with regard to the obligations under a contract is well known and recognized, and no confusion need arise if proper regard be had to the context.

This usage has been followed in the codification of the law of the contract of sale in the Sale of Goods Act. The word "condition" is used in the text of the Act, though no formal

definition is given to it. But in the interpretation clause "warranty" is expressly defined in the following terms:— "'Warranty' as regards England and Ireland means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated." It is clear from this definition that a breach of warranty entitles the other contracting party to damages only. In contrast to this the additional right in the case of a breach of a condition is fully recognized in s. 11. In all this the Act adopts the well-settled law that existed at the date when it was passed.

It will be seen, therefore, that a condition and a warranty are alike obligations under a contract a breach of which entitles the other contracting party to damages. But in the case of a breach of a condition he has the option of another and higher remedy, namely, that of treating the contract as repudiated. But, as I have said, he must act promptly if he desires to avail himself of this higher remedy, and in s. 11, sub-s. 1 (*c*), two cases are given in which he will be deemed as a matter of law to have elected to content himself with his right to damages. The two cases named are, the case where the buyer has accepted the goods or part thereof, and the case where the contract is for specific goods, the property in which has passed to the buyer. It is not necessary to consider the question whether this list is complete. I see no reason to suppose that the Act intends that these should be the only modes in which a buyer can effectively bar himself from taking advantage of the choice of remedies given in the case of a breach of a condition, but that is a point which it is not necessary to discuss in the present case. When a buyer comes within either of the cases set forth in s. 11, sub-s. 1 (*c*), he is in precisely the same position in all respects as if he had voluntarily elected to take the remedy of damages in accordance with the provisions of s. 11, sub-s. 1 (*a*).

The contract which the Court has to construe in the present case is (so far as material) as follows: "Sold to Messrs. Wallis, Son & Wells on the conditions printed on the back about 27½ qrs. sainfoin, 40*s*. ex Walker (common English), Pratt & Haynes."

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On the back are printed certain conditions, i.e., terms of the contract, the only material one being as follows: "(2.) Sellers give no warranty, express or implied, as to growth, description, or any other matters, and they shall not be held to guarantee or warrant the fitness for any particular purpose of any grain, seed, flour, cake, or any other article sold by them, or its freedom from injurious quality or from latent defect." It will be seen, therefore, that the defendants by this contract sell to the plaintiffs a certain quantity of common English sainfoin on the above terms. I need hardly say that the use of the word "conditions" to describe the printed terms of the contract has nothing in common with the special use of the word "conditions" in relation to contracts of sale or otherwise of which I have been speaking.

This, then, is the contract which the Court has to construe, and were it not for the difference of judicial opinion which exists in this case I should have looked upon it as a plain case. The contract is for the sale of a given quantity of common English sainfoin, and it is admitted by both parties that the purchaser was entitled under this contract to receive common English sainfoin. But the seller is careful to say that he gives no warranty of any kind; that is to say, using the definition of warranty in the Sale of Goods Act (which must apply, since neither the context nor subject-matter otherwise requires), he makes no agreement with reference to the goods which is collateral to the main purpose of the contract, i.e., the sale of common English sainfoin. The contract therefore means that the purchaser has the right to have delivered to him the stipulated quantity of common English sainfoin. The contract gives to him nothing more, but certainly it gives nothing less.

Now it is admitted that the vendors committed a breach of this contract in that they delivered seed of giant sainfoin, which is a different article of inferior value. Inasmuch as by the law the obligation to deliver the kind of goods stipulated for in a contract of sale is an obligation which has the status of a condition, this breach gave to the purchasers the choice of the two remedies, either of rejecting the goods and treating the contract as repudiated or suing for damages for delivery of the inferior article. But the purchasers resold the goods in

ignorance of the breach (the two kinds of seed bearing a close resemblance to one another in appearance), and by the fact that they have resold the goods they have prevented themselves from exercising the higher right. They must therefore content themselves with suing for damages for breach on the vendors' part of the obligation which lay upon them under the contract. This they are doing, and we are asked to say whether their claim is a good one.

I confess that for my own part I can see no possible answer to it. So soon as it is determined that there is an obligation under the contract to deliver common English sainfoin, it follows that the other contracting party is at least entitled to damages if he has suffered from a breach of it. Indeed, he is entitled to elect to take a still higher remedy, if he has not voluntarily or by conduct precluded himself from doing so. The ingenious argument of the counsel for the defendants in this case was, in my opinion, based upon a fallacy. He was compelled to admit that the vendors undertook the obligation of delivering common English sainfoin and that this was an obligation having the higher status of a condition. It was thus outside the language and the scope of the clause in the contract relating to warranties. But he sought to say that, although this clause as to warranties did not affect the existence of the obligation, it took away the right to damages for a breach of it. His argument was that under s. 11 a condition becomes a warranty if any portion of the goods is accepted. The answer to this argument is, in my opinion, twofold. In the first place s. 11, sub-s. 1, does not state that a condition becomes a warranty if the goods are accepted, but only that the legal remedies for the breach of a condition become, in that event, limited to the single remedy which exists in the case of a warranty, namely, suing for damages. Whether an obligation is a condition or a warranty is decided (as s. 11, sub-s. 1 (*b*), and the definition clause shew) by the contract itself and not by matters subsequent to the contract. Such matters (whether they consist of express election or election statutably implied from acts) may amount to a renouncement of, or may take away, the superior legal advantages of a condition as compared with a warranty, but they do not make it a warranty,

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and if the language of s. 11 be carefully examined it will be seen that it nowhere states that a condition ceases to be a condition, but merely that the breach of the condition can only be treated as a breach of warranty, that is, as a ground for damages and not for repudiation. By s. 11, sub-s. 1 (*a*), this is one of the remedies which is always open to the contracting party who is entitled to claim for a breach of a condition of the contract.

But there is another answer to the argument. The object and effect of the written contract are to define the respective obligations of the contracting parties. When the contract has been construed, that is, when those obligations have been ascertained, the law determines the consequences of their being violated. It is admitted that the language of the contract creates the obligation to deliver common English sainfoin and that this has the status of a condition. It cannot therefore be affected or limited by a clause which only negatives the existence of warranties, that is, of stipulations in the contract which, whatever their nature, are merely collateral to the main purpose of the contract, namely, the delivery of common English sainfoin. Since the language of the contract is admittedly adequate to create the obligation to deliver common English sainfoin, it follows of necessity that it brings with it the legal consequence that, if it is not performed, the purchaser has a right of action for damages for such non-performance. Counsel for the defendants would have us read the words as saying that although the vendors are bound to deliver common English sainfoin they are not liable in damages if they do not do so but deliver something else, a construction which to my mind is an impossible one. It would require express language in any contract to indicate any intention of negativing a right to damages for the breach of an obligation imposed by it, and I can find in the present contract no trace of any such language.

For these reasons I am of opinion that we ought to answer the question put to us in the special case in the affirmative and that this appeal should be dismissed.

FARWELL L.J. read the following judgment:—This is an appeal from the answer given by Bray J. to the question stated

in the award by way of special case—"whether on the facts stated the plaintiffs were entitled to recover 14*l.* against the defendants." The defendants sold by sample 27½ quarters of common English sainfoin seed grown by Walker to the plaintiffs on the terms of the sold note set out in the case. The seed was delivered in due course and was equal to sample and was resold by the plaintiffs. Neither the sample nor the bulk was common English sainfoin, but both were giant sainfoin. "The two seeds are indistinguishable, at all events by any examination of sample which is practicable in the course of a deal." The mistake was not discovered until the sub-purchaser had sown the seed and it had come up. Two questions appear to me to arise—(1.) what are the rights of the parties apart from the second condition in the contract, and (2.) what is the true construction and effect of that condition?

In my opinion the answer to the first question is to be found in s. 11 of the Sale of Goods Act. It is important to observe the difference in the position before and after the purchaser has accepted and disposed of the goods. Sub-s. 1 (*a*) gives the purchasers in a contract like the present an option before acceptance, but under sub-s. 1 (*c*) acceptance destroys this option and makes the only remedy an action for breach of warranty, and such warranty is by the definition in s. 62 "an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to an action for damages, but not to a right to reject the goods and treat the contract as repudiated." It is clear that the plaintiffs had accepted the goods within s. 35, for they had been delivered to them, and they have done an act in relation to them which is inconsistent with the ownership of the seller, inasmuch as they have sold and delivered the seed to third persons who have themselves sowed it. It is clear, therefore, that there is no longer any cause of action under the Act except for breach of warranty. And this is also in accordance with the common law, of which the Act (which is a codifying Act) is mainly declaratory; that law is in my opinion correctly stated in Benjamin on Sales (3rd ed.) at p. 595, where it is said, "when the vendor sells an article by a particular

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description, it is a condition precedent to his right of action that the thing which he offers to deliver or has delivered should answer the description." The tender of an article answering the description is a condition precedent to the purchaser's liability, and failure to perform such condition gives the purchaser the right to refuse the article or to return it, if he has received it, and to sue for damages for breach of contract, if the proper article be not duly tendered in due time; and if he has received and paid for it, to sue also for the price paid as money had and received for his use. But if, as here, he has accepted the goods and resold them, then, to quote Mr. Benjamin at p. 584, "the condition precedent changes its character and becomes a warranty or independent agreement, affording no defence to an action but giving right to a counter-claim for damages." This agrees with *Behn* v. *Burness*. (1) After such acceptance there was at common law no cause of action left on the contract for non-delivery, because there had been delivery and acceptance; but there was an action for breach of contract to deliver goods of the nature or quality agreed after delivery (see Bullen and Leake, 2nd ed., p. 213), and an action for breach of warranty of quality (see p. 232). But the general rule was that the condition precedent disappeared on acceptance by the buyer and was turned into a warranty, so that the construction of the contract was altered by the acceptance, as pointed out by Pollock C.B. in *Ellen* v. *Topp* (2), where he says, "It is remarkable that, according to this rule, the construction of the instrument may be varied by matter ex post facto; and that which is a condition precedent when the deed is executed may cease to be so by the subsequent conduct of the covenantee in accepting less. . . . . But this is no objection to the soundness of the rule, which has been much acted upon." There is nothing contrary to this in *Josling* v. *Kingsford*. (3) In that case a portion only of the so-called oxalic acid had been delivered; and the first count, and the only one left to the jury, was on the contract to deliver oxalic and "that the defendant had not delivered oxalic," and they found for the plaintiff; that case

(1) 3 B. & S. 751; 32 L. J. (Q.B.) 204. (2) (1851) 6 Ex. 424, at p. 441.
(3) 13 C. B. (N.S.) 447.

therefore was decided on the basis of non-delivery, and the only question was the construction of a particular condition in that contract. When a purchaser has accepted delivery of goods tendered by the vendor in performance of his contract, and has dealt with them in such a way as to render it impossible to return them, his true remedy against the vendor is for breach of warranty, although the goods were entirely different from those described in the contract. If the purchaser chooses to accept beans in performance of a contract to sell him peas, and disposes of them, either knowing them to be beans or intentionally taking the chance of their being beans, he cannot say that he did not accept them in execution of the contract, for he had no right to dispose of them except as purchaser under the contract: he cannot impose on the vendor a new contract to sell beans at a fair price and sue him on the old contract to sell peas: he can sue on the warranty that the goods delivered were peas and recover damages, but he cannot keep the beans and sue for the peas. The Sale of Goods Act certainly draws no distinction between the nature of the goods sold and their other qualities, when it speaks of description in s. 13, and I am not aware of any authority apart from the Act that draws such a distinction.

Now there is no question of fraud or unfair dealing in this case: the seeds in question are almost, in fact quite, indistinguishable by examination, and one or other of the parties must take the risk of mistake. I see nothing illegal or unreasonable in a contract that throws such risk on the purchaser: he doubtless takes the risk into consideration in fixing the price that he offers. The only question is whether the contract is clear, and I am of opinion that it is. "Sellers give no warranty, express or implied, as to growth, description, or any other matter, and they shall not be held to guarantee or warrant the fitness for any particular purpose of any grain, seed, flour, cake, or any other article sold by them, or its freedom from injurious quality or from latent defect." Sect. 13 of the Sale of Goods Act deals with the description, and provides that "where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient

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that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description"; and this relates to description as well of nature as of quality; s. 14 relates to warranty and condition as to quality or fitness for any particular purpose. The first part of condition 2 appears to be intended to cover, and in my opinion does cover, s. 13, and the latter part s. 14. The words are as wide as possible and exclude all liability that could be enforced by an action for breach of warranty; whether such liability could or could not have been enforced in another form of action at common law before the Judicature Acts is immaterial: whatever form it took, it remained an action for breach of contract in some form, and all such liability is excluded by the second condition. I am therefore of opinion that this appeal must be allowed. Bray J. followed as binding on him, without expressing any opinion of his own, *Howcroft* v. *Laycock*. (1) I agree with my Lord that that case cannot be supported. It is very shortly reported, and the reasons given are not satisfactory: no question of custom was or could be raised, and I fail to see why Day J. thought it irrational to suppose that buyer and seller dealing with an article like seed, exceedingly difficult if not impossible to distinguish with certainty, should bargain that the buyer should take the chance of the seed turning out to be that which both parties believed and hoped that it was.

Appeal allowed.

Solicitors for defendants: *Andrew Walsh, Gray & Rose.*

Solicitors for plaintiffs: *Rooke & Sons, for Brain & Brain, Reading.*

(1) 14 Times L. R. 460.

W. J. B.

[IN THE COURT OF APPEAL.]

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June 27, 28; *July* 7.

MARKT & CO., LIMITED *v.* KNIGHT STEAMSHIP COMPANY, LIMITED.

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Practice—Representative Action—Action by Shippers of Goods on a General Ship on behalf of themselves and other Shippers of Goods in the same Ship—"Persons having the same interest in one cause or matter"—Order XVI., r. 9.

The plaintiffs shipped goods on a general ship of the defendants for a voyage from New York to Japan. Before arriving at its destination the ship was sunk by a Russian cruiser on the ground that she was carrying contraband of war, and both ship and cargo were lost. In the writs in the present actions the plaintiffs were respectively described as suing "on behalf of themselves and others owners of cargo lately laden on board the steamship *Knight Commander*," and the writs were indorsed with a claim for "damages for breach of contract and duty in and about the carriage of goods by sea." A letter written by the plaintiffs' solicitors to the defendants' solicitors on the day of the issue of the writs stated that plaintiffs were suing on behalf of themselves and forty-four other persons, firms, or companies (whose names were given) who had shipped goods on board the ship:—

Held, that, upon the writs as they stood, the plaintiffs and those whom they purported to represent were not "persons having the same interest in one cause or matter" within the meaning of Order XVI., r. 9, and that the plaintiffs were not entitled to bring representative actions.

Held, further, by Vaughan Williams L.J. and Fletcher Moulton L.J. (Buckley L.J., dissenting), that shippers of goods in a general ship could not have "the same interest in one cause or matter" within the meaning of that rule, and that the writs were incapable of being so amended as to enable the plaintiffs to maintain representative actions.

Held by Buckley L.J., that the writs should be amended by describing the plaintiffs as suing on behalf of themselves and all others the owners of cargo lately laden on board the steamship *Knight Commander*, not being shippers of goods which are contraband of war, and the indorsements amended by asking for a declaration that the defendants were liable to the plaintiffs and to those on whose behalf they sued for breach of contract $\frac{\text{and}}{\text{or}}$ duty in and about the carriage of goods by sea.

Per Fletcher Moulton L.J.: No representative action can lie where the sole relief sought is damages.

APPEALS by the defendants from the refusal of Bucknill J. at chambers to set aside the writs in the respective actions.

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The writ in the first action was issued on May 5, 1910, and upon its face the plaintiffs were described as "Markt & Co., Limited, on behalf of themselves and others owners of cargo lately laden on board the s.s. *Knight Commander*." The writ was indorsed with a claim for "damages for breach of contract and duty in and about the carriage of goods by sea." The writ in the action of Sale & Frazar, Limited, was in the same terms.

The facts shewed that the defendants were the owners of the steamship *Knight Commander*, which in the year 1904, during the Russo-Japanese war, sailed on a voyage from New York to Japan as a general ship. The plaintiffs Markt & Co., Limited, were merchants carrying on business in the United States, and the plaintiffs Sale & Frazar, Limited, carried on business as merchants in Japan; and both of them, together with about forty-three other firms, persons, or companies, had shipped goods for Japan on board the *Knight Commander* under separate bills of lading. The ship was stopped and searched on the high seas when nearing Japan by a Russian cruiser; the crew were taken on board the cruiser, and the *Knight Commander* was fired into and sunk by the guns of the cruiser on the ground that she was carrying contraband of war; both ship and cargo were wholly lost. Claims were made against the Russian Government on behalf of the shipowners and cargo owners, but, no final decision having been given, these actions were brought in order to prevent the operation of the Statute of Limitations.

On the day on which the writs were issued the plaintiffs' solicitors (who were the same in both actions) wrote to the defendants' solicitors informing them that the plaintiffs Sale & Frazar, Limited, claimed on behalf of themselves and forty-four other persons, firms, or companies, and they gave a list of the names, which included the plaintiffs Markt & Co., Limited; and they went on to say that Markt & Co., Limited, claimed on behalf of themselves and all the other persons, firms, and companies mentioned in the list, and also on behalf of Sale & Frazar, Limited.

After service of the writs, the defendants took out a summons in each action asking that the writ should be set aside, or,

alternatively, that so much of the writ as referred to parties other than the plaintiffs named in the writ should be struck out, the ground of the application being that the case was not within Order xvi., r. 9, and that the plaintiffs could not sue in a representative character. The Master refused to set aside the writs or to make the suggested alterations in them, and his decision was affirmed by the judge. The defendants in each action appealed.

Leslie Scott, K.C. (*G. D. Keogh* with him), for the defendants. It is not competent for a plaintiff to sue as the representative of a class under Order xvi., r. 9, where the parties whom he claims to represent obviously have not the same interest in the cause or matter. In the present case the goods of the different shippers were shipped under separate bills of lading; the circumstances of the shipment would be different in the case of each shipper, and in respect of the claims of some of them there might be defences which would not be available in the case of the claims of the others. For instance, a shipper who himself had shipped contraband, or who knew that contraband was being carried on board but elected to run the risk, would be in a very different position from a shipper whose own goods were not contraband and who did not know that the ship was carrying contraband goods. Such an action as the present would therefore raise a heterogeneous collection of issues in respect of the various shippers respectively. By the terms of Order xvi., r. 9, there must be a common interest in the plaintiff and all those whom he represents; that is not the case here. The limit within which it is competent to a plaintiff to sue in a representative character was reached in *Duke of Bedford* v. *Ellis*. (1) To allow such an action as the present to be brought would be going far beyond that case. Even if the different shippers had been joined as plaintiffs by name, there would have been a joinder of plaintiffs not sanctioned by Order xvi., r. 1. [He also cited *Smurthwaite* v. *Hannay*. (2)]

Bailhache, K.C., and *Leck*, for the plaintiffs. This is in fact an underwriters' action, and the plaintiffs have authority to sue

(1) [1901] A. C. 1. (2) [1894] A. C. 494.

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from all the shippers represented. All the shippers represented by the plaintiffs have a common interest, and the main facts are common to the cases of all of them. The *Knight Commander* was sunk on the ground that she was carrying contraband of war, and, so far as all the shippers of non-contraband goods are concerned, the cause of action is that it was a breach of contract on the part of the shipowners to be carrying contraband of war, which might render the non-contraband portion of the cargo liable to seizure. The action is prima facie well constituted. If at a later stage it should appear from the pleadings that there is any difference in the case of some of the shippers, an application may be made to confine the action to the case of the others. Proceedings are pending in the Russian Courts to have the seizure of these goods declared invalid, and, in the event of their being successful, it will probably be unnecessary to proceed with the present actions. Meanwhile the Statute of Limitations has nearly run, and in order to prevent its possible operation as a bar to the claims of the shippers against the shipowners it was necessary to commence legal proceedings. It is true that a separate writ might have issued on behalf of each shipper, but that would have been stigmatized as oppressive and unnecessarily expensive. There was a difficulty in joining all the plaintiffs in one writ, for some of them were foreign firms, and, if the firm names had been inserted in the writ, it might not have been possible to comply with an order under Order XLVIIIA, r. 1, to give the names of the various co-partners. It was therefore decided to bring representative actions in the names of these plaintiffs and to give a list of the shippers represented by them, and it is submitted that upon the facts of the case this was a proper course to take, and that Order XVI., r. 9, is applicable. The intention was to sue on behalf of all those who shipped non-contraband goods; if any shippers of contraband goods have been included by mistake, their names can be struck out at a subsequent stage. It is, of course, true that each particular shipper has a separate interest in respect of his own goods, but in every other respect the interests of all the shippers are the same. The case is governed by *Duke of Bedford* v. *Ellis* (1); it

(1) [1901] A. C. 1.

is immaterial that in that case the common right or interest was given by statute. [They also cited *Drincqbier* v. *Wood.* (1)]

Keogh, in reply, cited *Beeching* v. *Lloyd.* (2)

Cur. adv. vult.

July 7. VAUGHAN WILLIAMS L.J. read the following judgment:— The plaintiffs in this case claim to sue in a representative character on behalf of themselves and others, owners of cargo lately laden on board the steamship *Knight Commander*. The defendants are the Knight Steamship Company, Limited. The indorsement on the writ is "The plaintiffs' claim is for damages for breach of contract and duty in and about the carriage of goods by sea." The question which we have to decide is whether or not the plaintiff company is entitled to sue in a representative character on behalf of "others the owners" of cargo lately laden on board the steamship *Knight Commander*. The writ does not quantify the word "others." The word does not disclose whether all the owners are intended and does not define which are the others. There is another action pending against the same defendants in which Markt & Co., Limited, are plaintiffs. This action is also a representative action and in all respects similar to the action in which Sale & Frazar, Limited, are plaintiffs, and the writ is issued by the same solicitors on the same day. A summons was issued in each case by the defendants for an order to set aside the writ of summons for irregularity, or in the alternative that so much of the writ as relates to parties other than the named plaintiffs be struck out on the grounds that the persons on whose behalf the action purports to be brought are not persons having the same interest in one cause or matter, and are not persons who have any right to relief in respect of or arising out of the same transaction or series of transactions, and that they are persons on whose behalf another action is brought for the same alleged causes of action.

These actions are not actions brought under the provisions of Order XVI., r. 1, which deals with the joinder of plaintiffs claiming right to relief in respect of or arising out of the same transaction or series of transactions as alleged to exist, whether

(1) [1899] 1 Ch. 393. (2) (1855) 3 Drew. 227.

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jointly, severally, or in the alternative where, if such persons brought separate actions, any common question of law or fact would arise. These actions are brought under the provisions of r. 9 of Order XVI., which runs: "Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the Court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested." If one looks merely at the indorsement on the writ and at the words of Order XVI., r. 9, it is difficult to come to the conclusion that those words justify the present plaintiffs suing as representatives of numerous persons "having the same interest in one cause or matter who may sue or be sued" or "may be authorised by the Court to defend in such cause or matter on behalf of or for the benefit of all persons so interested."

The action is brought, as appears from the indorsement on the writ, "for damages for breach of contract and duty in and about the carriage of goods by sea." So far as this action is an action for breach of contract, the origin of the contract was the respective bills of lading issued by the ship to the respective shippers. There is nothing on the writ to shew that the bills of lading and the exceptions therein were identical or that the goods the subject of the bill of lading were of the same class either in kind or in relation to the rules of war, under which the same article may be contraband or not according to its destination. As to the letter of May 5, 1910, written by the solicitors for the plaintiffs and addressed to the solicitors for the defendants, if one treats it as part of the indorsement of the writ, which it is not, it is convenient to consider whether it affects substantially the question whether the action is one which on the face of it appears to disclose the fact that it is brought by numerous persons having the same interest in one cause or matter. The letter begins with a notice that the plaintiffs abandon some eight actions by owners of cargo lately on board the steamship *Knight Commander* against the Knight Steamship Company, and then in respect of writ No. 1379 informs the defendants that Messrs. Sale & Frazar are claiming damages on behalf of themselves and some forty-six persons with names

and addresses which include nations and places all over the world, and the letter concludes with these words: "In the writ issued in the name of Markt & Company, Limited, those gentlemen claim on behalf of themselves and all the other firms and companies above mentioned and also on behalf of Messrs. Sale & Frazar, Limited, above mentioned." I do not think that it appears by the writ, even as amplified by the letter, that there is any bond or connection uniting the persons whom the plaintiffs affect to represent, except that these people are all of them shippers of goods on board the same ship the whole cargo of which was lost by the sinking of the *Knight Commander* by a Russian warship during the Russo-Japanese war. There is, in my opinion, no common purpose so far as the shippers are concerned and no connection which would justify a representative action either under r. 9 or under the old Chancery practice. But a construction has been put upon this r. 9 of Order XVI. by the House of Lords in the case of *Duke of Bedford* v. *Ellis* (1) which gives a somewhat more expanded area to the words of the rule than prima facie appears, and which, it is said, justifies the present representative action. I think not. Upon page 8 of the report of *Duke of Bedford* v. *Ellis* (1) one finds in the judgment of Lord Macnaghten these words: "Under the old practice the Court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could 'come at justice,' to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience; for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent."

Now the words "Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent" are the words by which Lord Macnaghten

(1) [1901] A. C. 1.

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describes the old practice before the Judicature Act of the Court of Chancery. And on page 9 he says, "There are plenty of other cases which shew that, in order to justify a person suing in a representative character, it is quite enough that he has a common interest with those whom he claims to represent," and goes on to say, speaking of the case before him, "All growers have the same rights. They all rely on one and the same Act of Parliament as their common charter." Lord Macnaghten then proceeds to quote the following passage from the judgment of Lord Eldon in *Cockburn* v. *Thompson* (1):— "The strict rule," he (Lord Eldon) said, "was that all persons materially interested in the subject of the suit, however numerous, ought to be parties . . . . but that, being a general rule established for the convenient administration of justice, must not be adhered to in cases to which consistently with practical convenience it is incapable of application. It was better," he added, "to go as far as possible towards justice than to deny it altogether." He laid out of consideration the case of persons suing on behalf of themselves and all others, "for in a sense," he said, "they are before the Court." The head-note to the case of *Adair* v. *New River Co.* (2) referred to by Lord Macnaghten contains the following passage:—"The general rule, requiring all persons interested to be parties, is dispensed with, where it is impracticable, or extremely difficult. In such a case, to obtain a decree, to establish the right of suit to a mill, for instance, the Court only requires parties sufficient to secure a fair contest; and, the right being established in that way, consequential relief may be had against the rest in another suit." These two quotations seem to dispose of any objection based upon the omission of some of the parties interested, and also of the suggestion that there cannot be a representative action in a case where individual consequential relief is claimed by or against those before the Court. I think that, even taking the old practice as described by Lord Macnaghten as governing the present practice, the writ in the present action cannot be supported, but I must observe that the practice regarding representative actions was limited to the Court of Chancery, and was

(1) (1809) 16 Ves. 321, at pp. 325, 326. (2) (1805) 11 Ves. 429.

not adopted by the Common Law Courts. What we have to do is to construe the Rules under the Judicature Act which define the application of the practice as to representative actions for the Common Law Division and the Chancery Division alike, and which properly construed will, I suppose, govern the present practice, notwithstanding any prior practice in the Court of Chancery.

I will now call attention to some differences in the claim and in fact between *Duke of Bedford* v. *Ellis* (1) and the present case. In *Duke of Bedford* v. *Ellis* (1) the claim was based upon the Covent Garden Market Act, 1828, which plaintiffs alleged gave various preferential rights in respect of the use of the market to a class of growers. They alleged that the Duke of Bedford in the management of his market did not comply with the provisions of the Act in certain particulars, and had inter alia exacted excessive tolls from the growers. They claimed declarations that they were entitled to the alleged preferential rights, an injunction to restrain the Duke from doing any acts contrary to the declarations so claimed, and an account of the sums charged in excess during the six years preceding the issue of the writ; whereas in the present case there is no common origin of the claims of those who shipped goods on board the *Knight Commander*—the contracts were constituted by the bills of lading, which manifestly might differ much in their form, and as to the exceptions, and probably would vary somewhat according to the nature of the goods shipped. It was said that this difficulty was got over by the alternative claim to the rights of the shippers against the shipowner as constituted by the mere fact of shipment, and that such rights were in all cases identical. I doubt if the indorsement includes anything but a claim in contract. The bill of lading in each case might qualify the liabilities of the shipowner as a carrier by sea. I do not see anything in the indorsement to differentiate the class on whose behalf the plaintiff claims to sue as a representative from a class constituted by those who shipped goods on board the *Knight Commander* when she started on this voyage.

These shippers no doubt have a common wrong in that their

(1) [1901] A. C. 1.

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goods were lost by the sinking of the *Knight Commander* by the Russian warship; but I see no common right, or common purpose, in the case of these shippers who are not alleged to have shipped to the same destinations. Moreover, it may be that there were contraband goods on board which justified the Russian action—it may be that some of the shippers knowingly shipped goods which were contraband of war. It may be that some of the shippers were innocent of such shipping of contraband goods. All sorts of facts and all sorts of exceptions may defeat the right of individual shippers. The case of each shipper must to my mind depend upon its own merits. The case is in no sense covered by the words of Lord Macnaghten on page 9 of the report of the case of *Duke of Bedford* v. *Ellis* (1) in the House of Lords. "All the growers have the same rights. They all rely on one and the same Act of Parliament as their common charter." There is nothing in the indorsement to shew that the shippers for whom the plaintiffs seek to recover in a representative action may not in fact rely on different sources of right. I am not saying that on the facts suggested in argument, but not alleged in the indorsement on the writ, a class might not be constituted whose claims might be derived from, and based upon, a common source of right; but the indorsement on the writ is not limited to any such class, and I do not believe that recourse would have been had to any such form of action had it not been for difficulties arising in respect of the Statute of Limitations if any other form of action had been adopted, and I do not think that the Judicature Act Orders and Rules intended that r. 9 of Order xvi. should be available whenever those on whose behalf the plaintiff affected to sue could shew that the right to relief arose in respect of or arising out of the same transaction or series of transactions alleged to exist, whether jointly, severally, or in the alternative where, if such persons brought separate actions, any common question of law or fact would arise, such as to allow a joinder of plaintiffs under Order xvi., r. 1.

I ought to mention the case of *Beeching* v. *Lloyd*. (2) In that case there was a bill by two of the intended shareholders of a projected company on behalf of themselves and all other depositors

(1) [1901] A. C. 1. (2) 3 Drew. 227.

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for the return of the deposits paid by the two plaintiffs. The bill alleged gross fraud in concocting the company and obtaining the deposits. A demurrer for want of equity, and on the ground that no two depositors could sue together for the mere return of deposits, was overruled. The bill prayed that it might be declared that the defendants named were severally bound to pay the plaintiffs, and the other persons who had paid deposits to the bankers of the New South Wales Navigation Company in respect of the shares subscribed for by them, the respective amounts which were paid by them respectively, and Kindersley V.-C. in overruling the demurrer said: "Now it appears to me to be a just principle that if an individual induces others to enter into a partnership and induces them by fraud to put money into what purports to be a common stock, it is impossible to say that each of those persons must file a separate bill. In such case there is not only a common object in the persons borrowing but a common object in those lending. Several persons here have been induced by fraud to concur in advancing money for the formation of a joint stock company; and it appears to me that in that state of things a bill may be filed by several of them, and that the principle established in *Jones* v. *Garcia del Rio* (1) does not apply." Now the case of *Jones* v. *Garcia del Rio* (1) to which the Vice-Chancellor referred, he says, establishes this principle, "that in cases simply of separate and distinct frauds against several persons those persons cannot join in suing. But it appears to me that there is a distinction between that case and this. There the object was on the part of the representatives of the Peruvian Government to raise a loan and to get for that purpose as much money lent as possible. Now the lending of money by one person has no sort of connection with the lending by another. There is a common purpose, it is true, so far as concerns the borrower, but there is no common purpose as concerns the lenders; there is no contract between them, and, therefore, that case it appears to me does not apply to the present." The common purpose in *Beeching* v. *Lloyd* (2) of those who took shares was to enter into a partnership. I find no such common purpose between the shippers. The purpose of each shipper was

(1) (1823) 1 T. & Russ. 297. (2) 3 Drew. 227.

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to forward his individual goods by a general ship to various destinations. The case of *Beeching* v. *Lloyd* (1) does shew, however, that where there is a common purpose a plaintiff may sue in a representative capacity even though each party to the common purpose will have individually to shew that he personally was induced by the fraud alleged to do the act in respect of which relief is claimed on his behalf. This statement by Kindersley V.-C. seems to accord with the passage on page 7 of Lord Macnaghten's judgment in *Duke of Bedford* v. *Ellis* (2), in which he says: "If the persons named as plaintiffs are members of a class having a common interest, and if the alleged rights of the class are being denied or ignored, it does not matter in the least that the nominal plaintiffs may have been wronged or inconvenienced in their individual capacity." In the present case, as I have already said, I do not find the common interest or purpose. I think that the plaintiffs in these two actions cannot sue in a representative capacity, and that this appeal ought to be allowed.

It was urged before us that the indorsement on the writ might be amended in some such form as "The plaintiffs Sale, Frazar & Co. on behalf of themselves and all other owners of cargo lately shipped on board the steamship *Knight Commander* other than those who shipped goods which were absolute or conditional contraband." I do not think that such an amendment ought to be allowed. I find no common purpose in it. We have never had this amendment so brought before the Court as that both sides could have a proper opportunity of arguing the new points which might well be discussed before the Court allowed the amendment. I think that the plaintiffs should be left to issue such new writs as they may think fit. I doubt whether any amendment could be so framed as to disclose a common purpose of the shippers, or any class of the shippers. There is no common statutory right as there was in *Duke of Bedford* v. *Ellis* (2), nor any common fund in course of formation as there was in *Beeching* v. *Lloyd*. (1)

FLETCHER MOULTON L.J. (3) In the month of July, 1904, during the Japanese war, a Russian cruiser stopped and searched

(1) 3 Drew. 227.
(2) [1901] A. C. 1.
(3) His Lordship's judgment was read by Vaughan Williams L.J.

on the high seas an English steamship called the *Knight Commander*. After the examination the cruiser transhipped the crew of the steamer and sank it there and then by shell fire. In defence of these proceedings the Russian Government alleged that the ship's papers were unsatisfactory, and that its cargo contained contraband both absolute and conditional. Legal proceedings on behalf of the owners of the ship and cargo were instituted before the Prize Court at Libau. These have been very protracted and are still unfinished, though it is suggested that the conclusion may be expected soon. Under these circumstances (confessedly influenced by the consideration that six years have nearly expired since the sinking of the vessel) parties interested in the cargo on board the *Knight Commander* have brought these two actions against the owners of that ship. In both cases the plaintiffs purport to sue in a representative character. The defendants contend that it is not competent for them so to do, and that they can only sue for their individual damages. We have to decide whether this contention is right.

Before discussing the important legal question here raised it is necessary to examine carefully the writs in the two actions. In the one writ the plaintiffs are described as Markt & Co., Limited, on behalf of themselves and others owners of cargo lately laden on board the steamship *Knight Commander*. In the other action the plaintiffs are described exactly in the same way, with the exception that Sale & Frazar are substituted for Markt & Co., Limited. It will be seen that the description of the classes on behalf of which the respective plaintiffs claim to sue is quite indefinite. The plaintiffs do not purport to sue, nor do they propose or desire to sue, on behalf of all the owners of cargo lately laden on board the ship in question, but only on behalf of some of such owners, and the writ does not specify which. In an endeavour to cure this defect, which must otherwise be unquestionably a fatal one, the solicitors for the plaintiffs in the two actions wrote a letter of May 5, 1910, to the solicitors of the defendant company, setting out a list of some forty-four firms (in which appears the name of Markt & Co., Limited) and informing the defendants that in the writ in the Sale & Frazar action Messrs. Sale & Frazar, Limited, were claiming to sue on

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behalf of all the firms in this list. They further informed the defendant company that in the Markt & Co., Limited action the plaintiffs were claiming to sue on behalf of all the firms in the same list and also on behalf of Messrs. Sale & Frazar, Limited. It will be seen, therefore, that by admission of the solicitors for the plaintiffs the two actions are brought by two different plaintiffs in respect of precisely the same people, they being ascertained, not by anything appearing on the record, but by the letter in question. It is not pretended by the plaintiffs that these are the whole of the firms who shipped by the *Knight Commander*. On the contrary we were informed by counsel that they were only (so far as the plaintiffs' knowledge extended) the firms that had shipped goods free from the objection that they were either absolute or conditional contraband. No reference, however, is made to this principle of selection either in the letter or in the writ, nor is there any evidence or admission that the facts are as thus suggested. It will be seen further that the firms in the list carry on business, some in Japan, some in the United States of America, and some in England and elsewhere. On behalf of this list of people, constituting, so far as can be gathered from the record, no specific class, but merely a collection of individuals identified by their names appearing in a list contained in a letter from the plaintiffs to the defendants, the plaintiffs each in his own action propose in a representative capacity to make claims for damages.

It can hardly admit of doubt that these two writs as they stand are hopelessly bad. In the first place it is essential in the case of representative actions that the class on behalf of which the relief is sought should be defined in the writ. It is impossible for the Court to give any judgment as to the rights of parties by virtue of their being members of a class without its being defined what constitutes membership of the class. A mere list tells the Court nothing, more especially when that list does not appear on the record. If such an action as this could possibly go to trial the case of each firm whose name appears in the list would have to be gone into in order to ascertain the facts relating to it, so that the Court might be able to pronounce whether and why its name should be included in such list. In

other words it would not be a representative action at all. If judgment were given upon such a writ as this, no estoppel could arise either for or against the defendants without each case being individually examined into.

But there is another objection which to my mind is absolutely fatal. I will take for the purpose of this part of my judgment that which I consider to be the most authoritative statement as to the cases in which representative actions can be brought, i.e., the statement of Lord Macnaghten in the case of *Duke of Bedford* v. *Ellis*. (1) It is as follows: "Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent." These words shew that where the claim of the plaintiff is for damages the machinery of a representative suit is absolutely inapplicable. The relief that he is seeking is a personal relief, applicable to him alone, and does not benefit in any way the class for whom he purports to be bringing the action. It is suggested, however, that these difficulties could be got over by amendment of the writ so that the plaintiffs would be described in the following fashion: "The plaintiffs Sale, Frazar & Co. on behalf of themselves and all other owners of cargo lately shipped on board the s.s. *Knight Commander* other than such as shipped goods which were absolute or conditional contraband." Plaintiffs' counsel shewed no willingness to accede to any such suggestion, but no doubt would prefer to amend his writs in this fashion rather than that the writs should be set aside so far as they are representative in character. I will therefore consider the case assuming this alteration to have been made.

There are two modes in which actions may be brought to establish the individual rights of several persons in one and the same action. The one mode is by joining them as plaintiffs, the other is by one or more bringing a representative action in respect of all of them. These modes of procedure are entirely distinct in character, and the cases to which they are applicable are widely different, and are laid down in separate and distinct rules, the former in Order XVI., r. 1, and the latter in Order XVI.,

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r. 9. The relation of the parties interested to the conduct of the action differs in the two cases, as does also the effect of the judgment. It is to my mind a confusion between these two modes of procedure, (which have nothing to do with each other,) that has led to the issue of the two writs which we have here to consider. The joinder as plaintiffs in one action of persons who are suing in respect of several rights claimed to belong to them individually is substantially a creation of the Judicature Acts and the Rules made under them. We are here dealing with actions for damages which under the old practice must have been brought in the Common Law Courts, and in such actions plaintiffs suing for individual relief were in general obliged to bring individual actions. But it is evident that in some cases such actions must, to a great extent, be mere repetitions one of the other, and, therefore, to avoid unnecessary expense various devices were resorted to even before the Judicature Acts by which the result of one action was made to govern the rights of many plaintiffs, as, for instance, the selection of one of the actions as a test action. But it was rare that any such method could be applied except with the consent of all parties, and this was felt to be an evil which needed to be remedied. Accordingly Order XVI., r. 1, was framed. In its original form it was held by the House of Lords not to apply to the joinder of plaintiffs with the object and effect of enforcing separate causes of action in one and the same action. Accordingly the form of the rule was altered, and now it clearly gives to distinct individuals in certain cases the right to unite as plaintiffs in one action to enforce separate rights of action belonging to them individually and not jointly. The cases in which this can be done are exhaustively enumerated in the rule by virtue of the alteration made therein, for by the decision of the House of Lords to which I have referred no right so to join different plaintiffs suing in respect of different causes of action existed while the rule was in its original form.

The rule reads as follows: "All persons may be joined in one action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative,

where, if such persons brought separate actions, any common question of law or fact would arise." There follows a proviso giving to the Court a power of modifying the procedure if it shall appear that such joinder may embarrass or delay the trial of the action. Judgment may be given for such of the plaintiffs as succeed, and the defendant is protected with regard to the costs which relate to the plaintiffs who are unsuccessful. This makes it clear that (subject to the control of the Court) persons can unite as plaintiffs though seeking individual relief in cases where the investigation would to a great extent be identical in each individual case. The policy of the rule is to avoid needless expense where it can be done without doing injustice to any one. And it carries out its object. No plaintiff can complain, for he cannot be made a plaintiff without his consent, so that if he avails himself of the rule it is because he desires to do so. The defendant has no cause to complain, because the plaintiffs are liable for his costs if he succeeds, and he has just the same rights in the action against each plaintiff as if a separate action had been brought against him by that plaintiff. No doubt there are cases in which he might be placed at a disadvantage by reason of the operation of our laws of evidence, but in such cases the Court can protect him from such an application of the rule as would work injustice.

Now I am far from saying that Order XVI., r. 1, might not be applied to such a case as the one to which the present actions relate, or that two or more owners of goods on board the *Knight Commander* might not unite in bringing an action against the owners of the ship in respect of the loss of their goods. But the parties interested decline to take this which is the proper course. The reasons are obvious, and to my mind they bring into prominence the justice of the rule. If such parties do unite as plaintiffs they must accept the ordinary responsibilities of plaintiffs. They would be liable for costs in case of failure, possibly they might have to give security for costs if not resident or carrying on business in this country, they could if necessary be ordered to give discovery or to answer interrogatories, and in short they would by so joining evade none of the rights or privileges which the defendants would as litigants possess, if

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separate actions had been brought by each plaintiff. But they would not in any way be penalized. They would have to establish their individual rights against the defendants as in separate actions, but nothing more, and the investigation and discussion of their claims as far as the evidence and arguments were applicable to all the cases would take place once for all, and thus expense would be saved. Seeing that their rights against the owners of the ship are in virtue of contracts separately made by each, and that the only common element is the partial identity in the alleged facts which must be established, and in the arguments which must be adduced to support their several claims, they certainly cannot in justice to the defendants claim greater advantages than those which they would obtain by such a joinder, and the fact that they are not content therewith prepares me to expect that what they seek to do in place of following this permissible procedure will be found to be in some way unfair to the defendants.

Representative actions are now regulated by Order XVI., r. 9. They originated in the Court of Chancery and were of common occurrence in that Court prior to the date of the Judicature Acts. There is no doubt that by Order XVI., r. 9, the procedure by representative action is extended to the Common Law side of the Supreme Court. But here a word of caution is necessary. In extending it the rule also formulates it. It may or may not accurately express the practice of the Court of Chancery at that date, but that is immaterial. It is the language of the rule that must govern us now, and even if it could be shewn that before the Judicature Act the Court of Chancery would have applied the procedure in cases not within the language of the rule, that would not affect the present practice in any branch of the Supreme Court. The rule defined what was in the future to be the practice of the Supreme Court, and it is to my mind immaterial whether on a consideration of the older decisions we are of opinion that in thus laying down the future practice it limited or enlarged or left unchanged the existing practice. We are bound to take the rule as a statutory formulation of the practice and thus as a new point of departure.

Order XVI., r. 9, reads as follows: "Where there are numerous

persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the Court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested." Nothing could be more striking than the contrast between the language of this rule and that of Order XVI., r. 1. The reason is obvious. In cases under r. 1 all the parties have the status and responsibilities of ordinary litigants, and the plaintiffs are such by their own consent. In representative actions it is wholly different. The plaintiff is the self-elected representative of the others. He has not to obtain their consent. It is true that consequently they are not liable for costs, but they will be bound by the estoppel created by the decision. The differences from the point of view of the defendant are equally striking. Those in whose behalf the action (so far as it is a representative action) is brought are not responsible for the costs, and are not subject to the ordinary liabilities of litigants in respect of discovery, &c. The language of the rule appears to me to present no difficulties of construction and to make clear the limitations of its scope. They answer in all respects to what one would expect from the considerations to which I have referred. The essential condition of a representative action is that the persons who are to be represented have the same interests as the plaintiff in one and the same cause or matter. There must therefore be a common interest alike in the sense that its subject and its relation to that subject must be the same. As I have already stated, Lord Macnaghten phrases it thus: "Given a common interest and a common grievance, a representative suit is in order if the relief sought is in its nature beneficial to all whom the plaintiff proposes to represent."

Whether we start from the language of the rule or from this authoritative interpretation of it, the present actions, even if the writs be amended as suggested, fail in every particular to answer the necessary condition of a representative action. The counsel for the plaintiffs suggests that the people in the list are in similar circumstances, because they shipped goods under similar bills of lading in the same ship. Assuming, for the sake of argument, that this is so (although nothing of the kind

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appears on the record), each of these parties made a separate contract of shipment in respect of different goods entitling him to its performance by the defendants and to damages in case of non-performance. It may be that the claims are alike in nature, and that the litigation in respect of them will have much in common. But they are in no way connected; there is no common interest. Defences may exist against some of the shippers which do not exist against the others, such as estoppel, set-off, &c., so that no representative action can settle the rights of the individual members of the class. But that which to my mind most strikingly indicates the fundamental error of the suggestion that the circumstances of these cases justify a representative action is that I can conceive no excuse for allowing any one shipper to conduct litigation on behalf of another without his leave, and yet so as to bind him. The proper domain of a representative action is where there are like rights against a common fund, or where a class of people have a community of interest in some subject-matter. Here there is nothing of the kind. The defendants have made separate contracts which may or may not be identical in form with different persons. And that is all. To my mind it is impossible to say that mere identity of form of a contract or similarity in the circumstances under which it has to be performed satisfies the language of r. 9. It is entirely contrary to the spirit of our judicial procedure to allow one person to interfere with another man's contract where he has no common interest. And to hold that by any procedure a third person can create an estoppel in respect of a contract to which he is not a party merely because he is desirous of litigating his own rights under a contract similar in form, but having no relation whatever to the subject-matter of the other contract, is in my opinion at variance with our whole system of procedure and is certainly not within the language of r. 9.

But the writs even as proposed to be amended fail to comply with Lord Macnaghten's interpretation of the rule in another and most essential particular. The relief sought is damages. Damages are personal only. To my mind no representative action can lie where the sole relief sought is damages, because

they have to be proved separately in the case of each plaintiff, and therefore the possibility of representation ceases. It is true that in *Duke of Bedford* v. *Ellis* (1) there was the claim for damages, but that was only a personal claim by the named plaintiffs, and it was solely on that ground that the action was held to be well framed so far as damages were concerned. The claims here are necessarily claims for damages only, and therefore no representative action can be brought. To hold that a representative action can be brought in a case where the causes are mere independent actions for damages arising out of one and the same set of circumstances would be to confound r. 1 with r. 9, and, as I have said, the language of these two rules shews that they are intended to have wholly different applications.

As I have said, in my opinion, we have to consider the language of r. 9 and be guided by it, and we are not justified in treating the earlier Chancery decisions as being authorities if they would extend or limit the ambit of the rule according to its natural construction. But I have examined all the cases in Chancery to which we were referred, and I can find in no one of them the slightest justification for bringing a representative action under such circumstances as in the present case. The case that goes the farthest is *Beeching* v. *Lloyd*. (2) In that case it was alleged that subscriptions to a projected company had been obtained by gross fraud. The subscribers had paid sums into a certain banking house in respect of the shares subscribed for by them, and a representative action was brought by two of the subscribers on behalf of themselves and the other subscribers to have the deposits returned to them. It appeared that the money contributed was partly applied in paying for an estate called the Kennington estate, and Kindersley V.-C. held that if that were established there might be a common fund which might be applicable towards satisfaction of the plaintiffs' demands. He accordingly overruled the demurrer to the bill specifically on this ground alone, without deciding whether the action was maintainable otherwise. So far from this giving countenance to the plaintiffs' arguments in the present case, it emphasizes the necessity that there should be a common fund

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against which the parties represented have claims if the procedure of a representative action is to be used.

Finally it is suggested that the difficulty can be got over by substituting for the claim for damages a claim for a declaration that persons shipping non-contraband goods are entitled to damages from the owners of the vessel under the circumstances of the case. To the best of my knowledge no declaration of this type has ever been made by English Courts, and it appears to me to be contrary to their practice. They do not permit a plain claim for damages to be split up by isolating out of it an abstract proposition of this kind. Each plaintiff has to prove the whole of his case. But even if such a declaration were made it would not in my opinion effect the purpose of the plaintiffs. A declaration by the Court has no further effect than an admission by the parties, and supposing such an admission were made by the parties, the Statute of Limitations would run from the original cause of action, and not from the date of the admission. For all these reasons I am of opinion that the writs before us are bad so far as they purport to be representative, and that they cannot be cured by any amendment, and that therefore this appeal should be allowed with costs here and below. If the plaintiffs choose to proceed with the actions as personal actions on behalf of the named plaintiffs, they can do so, but of course that does not affect the question of costs.

BUCKLEY L.J. In the year 1904 numerous persons and firms amounting in the aggregate to some forty-five in number shipped goods upon the steamship *Knight Commander* on a voyage from New York to certain ports, including Yokohama and Kobe. When off Yokohama the *Knight Commander* was captured and sunk by Russian cruisers on the ground, as alleged, that she was carrying contraband of war to Japan. The plaintiffs named in the writs allege that the defendants the owners of the steamship are liable for damages for breach of contract and duty in and about the carriage of their goods, and each of the other forty-four persons and firms makes similar claims in respect of their goods. The claimants have not issued, as they might have, forty-five writs. They have issued two writs, each of them expressed to be

a writ in a representative action, and Mr. Bailhache has explained to us that the intent of the two writs (whether adequately expressed or not) is that the one shall be the writ in an action in which the plaintiffs are representative of all owners of goods shipped upon the vessel not being shippers of contraband goods, and the other representative of all owners of goods shipped on the vessel including shippers of contraband goods. The two writs were issued on May 5, and on the same day the plaintiffs sent to the defendants' solicitors a letter giving the names and addresses of all the persons and firms on whose behalf they claimed. The question before the Court does not arise in the usual form. Commonly the point is that, forty-five writs having been issued, an application is made by the defendants to consolidate them or to stay forty-four of them until the forty-fifth has been tried. There are here but two writs, and the defendants' complaint is that there are not forty-five. This is an objection which the plaintiffs might easily meet by issuing further numerous writs, but the Statute of Limitations has or may have run since these two writs were issued, and the point of substance is or may be whether these writs should be set aside or limited to the claims of the named plaintiffs alone, with the result that all the other represented plaintiffs shall become barred by the Statute of Limitations.

There is no doubt a difficulty in sustaining the writs in their present form, but in my opinion an order ought not to be made to set the writs aside if by amendment they can be put in such a form as to render the actions proper representative actions within the rules.

The question before the Court arises upon Order xvi., r. 9, and not upon Order xvi., r. 1. But considerations with reference to Order xvi., r. 1, are, in my opinion, not irrelevant. Order xvi., r. 1, is a rule which allows of the joinder of several persons as co-plaintiffs. Under that rule many named persons may be, in the circumstances mentioned in the rule, joined as co-plaintiffs in respect of several rights to relief. Order xvi., r. 9, is a rule which allows one named person to sue as representing both himself and numerous other persons. The purpose and intention of r. 9 was to apply to all Divisions of the High Court the practice which

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had prevailed in the Court of Chancery when the parties were so numerous that you never could "come at justice" if everybody interested was made a party: per Lord Macnaghten in *Duke of Bedford* v. *Ellis*. (1) *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* (2) was a case in which the matter arose in the form of the question whether an unincorporated society could be sued by its collective name. Lord Lindley there said: "The rules as to parties to common law actions were too rigid for practical purposes when those rules had to be applied to such" (i.e., unincorporated) "societies. But the rules as to parties to suits in equity were not the same as those which governed Courts of common law, and were long since adapted to meet the difficulties presented by a multiplicity of persons interested in the subject-matter of litigation. Some of such persons were allowed to sue and be sued on behalf of themselves and all others having the same interest. This was done avowedly to prevent a failure of justice: see *Meux* v. *Maltby* (3) and the observations of the Master of the Rolls, Sir George Jessel, in *Commissioners of Sewers* v. *Gellatly*. (4) The principle on which the rule is based forbids its restriction to cases for which an exact precedent can be found in the reports. The principle is as applicable to new cases as to old and ought to be applied to the exigencies of modern life as occasion requires." It is, of course, no objection to a representative action that the rights as between each of the represented parties and the defendants arise under a separate contract made by one party with the defendants to which no other of them is a party. That is so in most if not in every representative action. When one creditor sues on behalf of himself and all other creditors for administration, the debt of each represented creditor arose of course under a contract to which no other of his represented co-plaintiffs was a party. The question is not whether there are numerous separate contracts. "To justify a person suing in a representative character it is quite enough that he has a common interest with those whom he claims to represent": per Lord Macnaghten, *Duke of Bedford* v. *Ellis*. (5) "Given a common interest

(1) [1901] A. C. 1, at p. 8.
(2) [1901] A. C. 426, at p. 443.
(3) (1818) 2 Swans. 277.
(4) (1876) 3 Ch. D. 610, at p. 615.
(5) [1901] A. C. at p. 9.

and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent": per Lord Macnaghten. (1) It may be, and I think it is the case, that in a representative action the plaintiff must be in a position to claim some relief which is common to all, but it is no objection that he claims also relief personal to himself. In a creditor's action for administration the plaintiff claims administration for the benefit of all, but it results in relief to himself and to every represented creditor severally. Many representative actions are actions in which the represented parties all have a common right against property, e.g., where one debenture-holder sues on behalf of himself and all others to enforce a security which enures for the benefit of all. But it is not necessary that the represented parties shall have a common right against property. The creditor who sues on behalf of himself and all other creditors for administration is not enforcing a right against property on which he has a security. At the same time it is true that he is enforcing the right of himself and others to be paid out of the deceased's assets, and in that sense is enforcing rights against a fund. But in the Court of Chancery the rule did not stop here. In *Beeching* v. *Lloyd* (2) Kindersley V.-C. overruled the demurrer on two grounds; the first was that there was an allegation sufficient to support a claim against a common fund which might be applicable towards satisfaction of the plaintiffs' demand. With this I am not concerned. But the second, which he calls the main, ground he also held to be good. The second was a claim by the plaintiffs for themselves and all others who had paid deposits in respect of the subscription for certain shares to recover from six gentlemen on the ground of fraud moneys which the defendants had received to be put into the common stock of a projected joint stock company. The Vice-Chancellor rested his decision upon the ground that there was a common purpose in several lenders if the subscriptions of all were to go into a common stock. His decision affirms the proposition that a common purpose in advancing money which is to go into a joint stock fund justifies a representative action to render defendants personally liable,

(1) [1901] A. C. at p. 8. (2) 3 Drew. 227.

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notwithstanding that the remedy sought is a personal judgment against them and not the enforcement of rights against that common fund or any common fund. In *Duke of Bedford* v. *Ellis* (1) Lord Halsbury and Lord Brampton dissented from the judgment of the majority of the House, but there is a paragraph in Lord Brampton's judgment to which Lord Halsbury assented from which it seems to me plain that even the dissenting Lords in that case would have decided this case in favour of the view which I am taking. In that case there were four plaintiffs, Ellis, Gray, Miller, and Ashby, who claimed certain rights as tenants of yearly cart stands. There were other plaintiffs, Pullinger and Peacock, who claimed as tenants in respect of yearly pitching stands. The passage to which I refer and which I will read in a moment affirms that the four persons first named were rightly joined and could rightly sue in a representative action, and that the same was true of the latter two, but that the claim of the four and the claim of the two could not be combined in one action; that the action must be confined to either the one or the other. But the passage affirms that as to the one class the claim ought to stand. The passage is as follows: "As regards claim number 2, relating to the yearly cart stands, the four plaintiffs Ellis, Gray, Miller and Ashby have undoubtedly stated separate causes of action in respect of which they have jointly claimed a declaration; they have also claimed injunctions and separate accounts and repayment of excessive charges. They clearly are rightly joined. The same common question would have arisen if they had brought separate actions." So far this is a case under Order XVI., r. 1, and affirms that these four plaintiffs could combine in respect of separate causes of action in which they jointly claimed a declaration, but claimed separate accounts and payments of excessive charges made on each of them respectively. Lord Brampton then goes on: "They are also entitled to sue on behalf of all other growers having the same interest in one cause or matter, that is to say, the preferential rights they claim to be accepted as tenants of yearly cart stands as described in s. 7 of the Act." This passage relates to the right to sue under Order XVI., r. 9, and affirms that

(1) [1901] A. C. 1.

these plaintiffs could under that rule sue on behalf of all other growers on the ground that they had within the words of r. 9 the same interest in one cause or matter.

To apply this to the present case. In the question whether the owners of the *Knight Commander* committed a breach of contract or duty in shipping on the vessel goods which were contraband of war all shippers of goods which were not contraband of war have the same interest. It is not accurate to say that they have a similar interest. They have exactly the same interest although it will result in the case of each of them in a different measure of relief. In *Beeching* v. *Lloyd* (1) the common purpose or object (the Vice-Chancellor uses both words) was to contribute to the joint stock of the company to which all the represented parties intended to subscribe. In this case the purpose or object of each and all of the shippers was to consign their goods by a vessel which should observe the duty of not shipping also goods which were contraband of war—a duty which her owners owed to all such shippers alike. Cargo owners on a general ship are not partners, but they have a common interest in the ship on which their goods are carried. In respect of that interest they are in a position to claim relief which is common to all of them. They can claim a declaration that the defendants are liable to the plaintiffs and those on whose behalf they sue for breach of contract and of duty in shipping contraband of war. In respect of that liability which exists towards all each is entitled severally to relief which exists only towards himself. Supposing that declaration be made, the named plaintiffs, say Markt & Co., Limited, can recover the damage to which they are entitled. To enable the represented firms to recover the damages which upon the footing of the declaration may be recoverable by them requires, no doubt, further steps, such as are always necessary in a representative action to give to the represented parties the particular relief to which each is entitled in respect of the common relief which is for the benefit of all. Subsequent proceedings would be necessary, and in these it would be open to the defendants to contend that as regards any particular plaintiff by representation

(1) 3 Drew. 227.

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he was for some reason personal to himself not entitled to recover. Such difficulties always occur in every representative action. The purpose of Order XVI., r. 9, was, I think, to extend to common law actions the flexibility which had for many years been enjoyed in actions in the Court of Chancery. If I may say so respectfully, I wholly agree with Lord Lindley that the principle upon which the rule is based forbids its restriction to cases for which an exact precedent can be found in the reports. This seems to me to be exactly a case in which the spirit, nay, more, the words, of Order XVI., r. 9, justify, and good sense requires, that the principle should be extended to a case for which I daresay no precedent is exactly to be found. If the writ in Markt & Co.'s action were amended so that the plaintiffs should be expressed to be Markt & Co., Limited, on behalf of themselves and all others the owners of cargo lately laden on board the steamship *Knight Commander* not being shippers of goods which were contraband of war, and the indorsement were amended so as to ask for a declaration that the defendants are liable to the plaintiffs and those on whose behalf they sue for breach of contract $\frac{\text{and}}{\text{or}}$ duty in and about the carriage of goods by sea, and for damages, that writ would, I think, be good within Order XVI., r. 9. The same would be true with the writ in the other action if that were similarly amended but expressing the represented class to be owners of goods shipped, including shippers of goods which were contraband of war. The course which the Court ought to take, in my opinion, is to offer the plaintiffs an opportunity of amending their writs in these respects and, upon their electing so to do, to dismiss these appeals.

Appeals allowed.

Solicitors for plaintiffs: *Waltons & Co.*

Solicitors for defendants: *Rawle, Johnstone & Co., for Laces & Co., Liverpool.*

W. J. B.

[IN THE COURT OF APPEAL.]

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1910
July 29.

In re JACOB MAGNUS.
Ex parte SALAMAN.

Bankruptcy — Marriage Settlement — Covenant by Husband to settle after-acquired Furniture — Furniture afterwards bought and used at Family Residence—Bankruptcy of Husband—Title of Trustee in Bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 47, *sub-s.* 2.

The debtor by his marriage settlement settled the furniture in his private residence upon trust in the first instance for the use and enjoyment of his wife during her life and covenanted that any furniture afterwards acquired by him during the life of his wife should form part of the settlement. The debtor and his wife, after many changes of residence, ultimately moved into a large house where they lived together until the debtor's bankruptcy, and the debtor purchased a large amount of additional furniture for this house. There was no formal delivery of the additional furniture to the trustee of the settlement, but he occasionally visited the debtor and his wife and saw the furniture. After a receiving order had been made against the debtor he removed all the furniture at the family residence to a warehouse. The trustee in the bankruptcy claimed the after-acquired furniture on the ground that it had not been "actually transferred" to the trustee of the settlement pursuant to the covenant as required by s. 47, sub-s. 2, of the Bankruptcy Act, 1883 :—

Held, that, in view of the fact that the furniture had been used by the wife in accordance with the trusts of the settlement, no formal transfer to the trustee of the settlement was necessary, but that in the eye of the law there had been an actual transfer made in pursuance of the covenant by the debtor to the trustee of the settlement and by the trustee of the settlement back to the wife, and that the claim of the trustee in the bankruptcy failed.

Dictum of Wright J. as to "actually transferred" in *In re Reis*, [1904] 1 K. B. 451 (1), at p. 456, overruled.

Appeal from a decision of Phillimore J.

By a settlement dated October 2, 1899, and made on the marriage of the debtor, Jacob Magnus, with Celia Lemel, a policy of insurance and the household furniture, goods, chattels, and other effects at 35, Highbury Park, where the debtor resided, were assigned by the debtor to the trustees of the settlement, upon trust for the wife for life for her separate use and to pay unto and permit her to receive the net income of the said trust

1) Reversed on the facts, [1904] 2 K. B. 769 ; [1905] A. C. 442.

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property however constituted and use and enjoy the said household furniture, goods, chattels, and other effects until sale and conversion, and after her death upon trusts for the benefit of the debtor and the children of the marriage. And the debtor covenanted with the trustees to keep the furniture and chattels in repair and to replace any that might be damaged or injured, "And also that in case the said Jacob Magnus shall at any time or times during the life of the said Celia Lemel purchase or acquire any other plate linen chattels or household effects or in case the said Celia Lemel shall become possessed of or entitled to any real or personal estate of the value of 50*l.* or upwards then the same shall be considered as and form part of the said trust premises intended to be hereby settled and that the said Jacob Magnus and Celia Lemel his and her heirs executors and administrators and all persons claiming under him or her will execute and do any further act or deed that may be requisite or necessary for effectually transferring or vesting the same in the trustees or trustee for the time being as the trustees or trustee may require."

After the marriage the debtor at first resided with his wife at Highbury Park, and after changing his residence several times he eventually moved into a large house at Esher called Moleside, which he purchased in his wife's name, where he lived with his wife and family until his bankruptcy. From time to time he purchased additional furniture, and in particular he purchased a large quantity of furniture when he moved into Moleside. There was no formal delivery of the after-acquired furniture to the trustees of the settlement, nor was any inventory taken either of the furniture existing at the time of the marriage or of the after-acquired furniture, but the debtor's brother, Henry Magnus, who for many years had been the sole acting trustee of the settlement, visited the debtor and his wife from time to time at their various houses and saw the furniture, and on more than one occasion the question of settlement was referred to.

On December 15, 1909, a receiving order was made against the debtor, and on March 16, 1910, he was adjudicated a bankrupt.

In the meantime, namely, in January, 1910, the debtor, without the knowledge or consent of his brother, removed the whole of the furniture at Moleside to the warehouse of W. Whittlesee, of Cricklewood, and again removed part of it to the sale rooms of Messrs. Glazier & Sons.

The trustee in the bankruptcy claimed all the furniture purchased by the debtor since his marriage on the ground that it had not been actually transferred to the trustee of the settlement pursuant to the covenant as required by s. 47, sub-s. 2, of the Bankruptcy Act, 1883 (1), and, on the refusal of the latter to admit his claim, he applied to the Court, as against the trustee of the settlement, for a declaration that he was entitled to the furniture, and, as against the warehousemen, for an order for delivery up of the same.

Phillimore J. dismissed the applications. He said that the question was whether the furniture had been actually transferred within the meaning of s. 47, sub-s. 2, of the Bankruptcy Act, 1883. What more could have been done? If the waggons containing the goods had been sent to the trustee's house and had then been sent on to Moleside the case would not have been arguable. But in his opinion it was not necessary to go through that form. The proper way of transferring the goods was to apply them for the purpose for which they were to be used under the settlement trusts, and they were taken to the family residence for the wife to use them. The principle of *Barker* v. *Furlong* (2) and *Ramsay* v. *Margrett* (3) supported this view. The goods were in the house where the trustee of the settlement was bound to put them, and they were used by the people who ought under the settlement to use them. The title effectually passed, and the possession

(1) Bankruptcy Act, 1883, s. 47, sub-s. 2: "Any covenant or contract made in consideration of marriage, for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in the bankruptcy."

(2) [1891] 2 Ch. 172.

(3) [1894] 2 Q. B. 18.

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passed, directly they were taken to the house with the intention that they should constitute part of the general stock. As to *In re Reis* (1) he could not infer from the judgment of Stirling L.J. that the Lord Justice thought that a deed was necessary to effect a transfer, but, even if it were, the two cases were not parallel. The covenant in *In re Reis* (2) was extraordinarily wide, and there was no special covenant about settling furniture. Here the covenant was not unreasonable because it was primarily a covenant for the settlement of furniture.

The trustee in the bankruptcy appealed.

Hansell, for the trustee in the bankruptcy. The trustee in the bankruptcy is entitled to the after-acquired furniture because there was no "actual transfer" before the debtor became bankrupt within s. 47, sub-s. 2, i.e., before he committed the act of bankruptcy upon which the receiving order was made. Here nothing was done to vest the property in the trustee of the settlement. There was no transfer by deed or delivery such as is necessary to satisfy the words "actually transferred." In *In re Reis* (3) Wright J. said that the very object of that language was to exclude any argument as to constructive transfers and that the sub-section was meant to apply unless an actual legal transfer pursuant to the contract or covenant had been made before the commencement of the bankruptcy. That case was reversed by the Court of Appeal and by the House of Lords (4), but only on the question of fact whether there had been an act of bankruptcy, but neither Court differed from Wright J. on any question of law, and this was expressly stated by Stirling and Vaughan Williams L.JJ. in the Court of Appeal. That amounts to an implied affirmance by two out of the three Lords Justices of his observations as to the meaning of "actually transferred." Phillimore J. was misled by *Barker* v. *Furlong* (5) and *Ramsay* v. *Margrett*. (6) In neither of those cases was there any question of bankruptcy law, and they dealt with a different

(1) [1904] 1 K. B. 451; [1904] 2 K. B. 769; [1905] A. C. 442.
(2) [1904] 1 K. B. 451.
(3) [1904] 1 K. B. 451, 456.
(4) [1904] 2 K. B. 769; [1905] A. C. 442.
(5) [1891] 2 Ch. 172.
(6) [1894] 2 Q. B. 18, 28.

subject-matter. In *Barker* v. *Furlong* (1) the question was not as to transfer, but as to possession, and there the trustee had actually taken possession. *Ramsay* v. *Margrett* (2) is distinguishable on the grounds stated by Wright J. In order to satisfy the sub-section the property ought to have been transferred either by a bill of sale or by delivery, and it may be inferred from the language of Stirling L.J. that that was his view. There was here no evidence even of constructive delivery, but, assuming that there was, constructive delivery is not a compliance with the terms of the sub-section. If Phillimore J. is right the sub-section can have no operation at all.

G. Wightman Powers, for the trustee of the settlement, *Ralph Bankes*, for Whittlesee, and *P. M. Francke*, for Glazier & Sons, were not called upon to argue.

COZENS-HARDY M.R. This appeal raises a somewhat curious point of bankruptcy law. [The Master of the Rolls then referred to the trusts of the marriage settlement and read the covenant to settle after-acquired furniture and s. 47, sub-s. 2, of the Bankruptcy Act, 1883, and continued :—]

Now what happened was this. No question arises as to the furniture which was in existence at the date of the settlement. Although no inventory was taken by the trustee at that time, the furniture remained in the house occupied by the husband and wife, and the wife had the use and enjoyment of it, and it would have been idle form to have said that it must have been formally put in the possession of the trustees by delivery to them, and that then possession must have been given back to the wife. But the married couple changed houses : they ultimately moved into a much larger house at Esher, and while there the debtor became bankrupt. Fresh furniture to a considerable extent was purchased by the husband and taken to the house where he and his wife were living, and the wife had the use and enjoyment of this furniture which she was intended to have. The only acting trustee of the settlement was on visiting terms with the husband and wife. He saw the furniture there, and there was a conversation between him and the husband with

(1) [1891] 2 Ch. 172. (2) [1894] 2 Q. B. 18.

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reference to this, and although there was no bill of sale of all or any part of this furniture,—a bill of sale would not have required registration if it had been executed—nor was there any formal delivery of any distinct article of furniture, the question is whether this is not a case in which, applying what I think are the recognized doctrines of the Court, we ought to say that there was, in the view of the law, a passing of the possession of these chattels from the husband who purchased them to the trustee, and the handing back of them by the trustee to the wife in order that she might have, as she had, the use and enjoyment of them. On general principles that seems to me to be clearly right in point of law; but then it is said this furniture has not been "actually transferred." The question whether property has been actually transferred is a question which must depend on the nature of the property. But these chattels were things which passed by delivery, and I think we should be going altogether wrong if we were to hold that these goods, having regard to the mode in which they were dealt with, were not given into the possession of the wife by means of an intermediate passing of possession from the husband to the trustee and back from the trustee to the wife. Stress has been laid by counsel for the appellant in his very clear and important argument upon the observations of Wright J. in the case of *In re Reis.* (1) Those observations were not necessary to the decision of the case. For in that case there was an actual bill of sale of the furniture—a bill of sale which was not registered, but which did not require registration. There was a grant and conveyance of the freehold property which was necessary, and Wright J. said this: "It has been argued with great force that constructive transfers are enough. It seems to me, however, that the very object of the language used is to exclude all such arguments, and that the sub-section is meant to apply unless an actual legal transfer pursuant to the contract or covenant has been made before the commencement of bankruptcy." I hold that in the view of the law there has been a transfer made in pursuance of the covenant by the husband to the trustee and by the trustee back to the wife. That is the

(1) [1904] 1 K. B. 451, 456.

inference which the learned judge who heard the trustee in the box drew, and I should be very slow to differ from him on that point. In my opinion the decision of the learned judge was right, and this appeal should be dismissed.

FARWELL L.J. I am of the same opinion. The words "actually transferred" must be read with reference to the subject-matter of the transfer. If it is land, a deed is required: if it is furniture or chattels, they pass by delivery. Test it in this way. The covenant in question by the husband relates only to plate, linen, china, chattels, or household effects. Assuming that the husband at various times during the year, say fifteen or twenty times, buys fresh chattels, is the trustee bound or even entitled to go to him on each occasion and say "You have bought a table, be good enough to execute a bill of sale of it to me"? Could the trustee properly bring actions to compel the execution of twelve or fifteen deeds of transfer so as to vest the various chattels bought from time to time in him. Such transfers serve no useful purpose, for be it observed that this deed if it is executed does not require registration. The suggestion is either that the trustee should go arm in arm with the purchaser in each case and direct the property to be transferred to the house, or that these useless deeds of transfer should be executed and expense incurred on each occasion. In this case the property went to the right people: it was held by the cestuis que trust in accordance with the trusts of the settlement, and it was in the eye of the law in the possession of the trustee. I think that Phillimore J. was quite right, and that this appeal should be dismissed.

KENNEDY L.J. I agree.

Appeal dismissed.

Solicitor for appellant: *B. Barnett.*
Solicitor for respondent Magnus: *H. Vaughan Whitehead.*
Solicitors for respondent Whittlesee: *H. Boustred & Son.*
Solicitor for respondents Glazier & Sons: *T. Stuart.*

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1910
June 16, 17.

[IN THE COURT OF APPEAL.]

THE KING *v.* GOVERNOR OF HIS MAJESTY'S PRISON, BRIXTON.

Ex parte SAVARKAR.

Practice—Habeas Corpus—Appeal — Criminal Cause or Matter — Fugitive Offender—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 47—*Application to Court of Appeal under Fugitive Offenders Act*, 1881 (44 & 45 *Vict. c.* 69), *s.* 10—*Estoppel by Judgment—Res Judicata—Absence of Adjudication as of Record.*

An appeal will not lie to the Court of Appeal against the refusal of a Divisional Court to issue a writ of habeas corpus in the case of a prisoner committed under the Fugitive Offenders Act, 1881.

An order nisi for a habeas corpus was obtained in the King's Bench Division on the application of a person in custody under the Fugitive Offenders Act, 1881, but was afterwards discharged. The affidavit upon which the order nisi was obtained stated (inter alia) matters material as grounds for the exercise of the power given by the Fugitive Offenders Act, 1881, s. 10, but the order nisi was in form simply for a habeas corpus, and not, in the alternative, for relief to the prisoner under s. 10. On the argument of the order nisi the matters referred to in the affidavit as aforesaid were discussed, and the Court in giving judgment pronounced them insufficient as grounds for the exercise of the powers given by s. 10 of the before-mentioned Act in favour of the prisoner. The order ultimately drawn up was, however, simply for discharge of the order nisi for a habeas corpus. An application was subsequently made to the Court of Appeal to exercise the powers given by s. 10, as having original jurisdiction in that behalf under the Act concurrently with the High Court. A preliminary objection was taken to the hearing of the application on the ground that the matter had been previously adjudicated upon by the King's Bench Division, and was therefore res judicata:—

Held by Vaughan Williams L.J., Fletcher Moulton L.J., and Buckley L.J., that inasmuch as the only matter adjudicated upon by the order of the King's Bench Division, as drawn up, was that the order nisi for a habeas corpus should be discharged, the matter of the application to the Court of Appeal was not res judicata, and (Buckley L.J. doubting) that the Court of Appeal had original jurisdiction to entertain the application.

Quære, whether, in a case where an application for relief under s. 10 of the Fugitive Offenders Act, 1881, has been adjudicated upon, and an

order has been made dismissing the same in the High Court, it is competent for the applicant to make a similar application to the Court of Appeal.

APPEAL from an order of a Divisional Court (Lord Alverstone C.J., Pickford J., and Lord Coleridge J.) discharging an order nisi for the issue of a habeas corpus.

In this case an order nisi for a writ of habeas corpus was obtained on the application of one Venayak Damodar Savarkar, who had been committed to His Majesty's prison at Brixton by the chief magistrate at Bow Street under the Fugitive Offenders Act, 1881, for deportation to India to be tried there in respect of alleged offences under the Indian Penal Code.

The offences charged against the said Venayak Damodar Savarkar were (1.) waging, and abetting the waging of, war against the King (Indian Penal Code, 121); (2.) conspiring to wage war against the King (Indian Penal Code, 121a); (3.) collecting arms with intent to wage war against the King (Indian Penal Code, 122); (4.) sedition (Indian Penal Code, 124a); (5.) abetment of murder (Indian Penal Code, 302 and 109). It was stated by the affidavit of Savarkar, upon which the order nisi for a habeas corpus was obtained, that the alleged acts constituting the said offences, as shewn by the evidence for the Crown, were substantially the following:—(*a*) That from January to the end of May, 1906, in India he uttered seditious speeches; (*b*) that in 1908 and 1909 in England he uttered seditious speeches, circulated seditious literature, wrote letters inciting to sedition, procured arms to be taken to India for use against the Government, and abetted murder. The before-mentioned affidavit of Savarkar, after setting forth various matters relating to the question of the validity of his imprisonment under the Fugitive Offenders Act, and stating that the deponent had lived in England since 1906, and other circumstances of the case, and that he desired to be tried in England for any offences alleged to have been committed anywhere by him during his residence here, proceeded as follows: "(8.) Under the foregoing circumstances I submit that it would be unjust and oppressive to order my removal to India, and that the criminal law ought not to be strained against any subject of the Crown. The

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trial in India would be oppressive, because the procedure and admissibility of evidence there differ materially from the practice in England: for instance in India the depositions of Deshpande Karwe and Kanhere, who have been executed, would be admissible under s. 512 of the Criminal Procedure Code (Act No. 5 of 1908) and also under the Indian Criminal Law Amendment Act (No. 14 of 1908), under either of which Acts my trial must take place: and because the Indian Government can afford to send here witnesses and evidence taken upon commission in India, whilst I am without means to compel my witnesses who are in England or on the Continent to go to India or to bear the expense of a defence here."

The order nisi for a habeas corpus was as follows: "It is ordered that Tuesday the 31st day of May instant be peremptorily given to the governor of His Majesty's prison at Brixton in the county of London, to shew cause why a writ of habeas corpus should not issue directed to him to have the body of the said Venayak Damodar Savarkar before this Court immediately to undergo and receive all and singular such matters and things as this Court shall there and then consider of and concerning him in this behalf, upon the following grounds that is to say:— (1.) that the said Venayak Damodar Savarkar is not a fugitive offender within the meaning of the Fugitive Offenders Act 1881 (*a*) at all, or (*b*) in respect of the offences alleged to have been committed by him since May, 1906: (2.) that the depositions of witnesses used in evidence before the magistrate at Bow Street Police Court were not evidence upon which the said magistrate could lawfully act, having regard to section 112 of the Code of Indian Criminal Procedure (Act 5 of 1898) and to the fact that the said Venayak Damodar Savarkar had not absconded in respect of (*a*) any of the offences alleged against him, (*b*) those offences alleged to have been committed by him since May, 1906: (3.) that, as regards the offences alleged to have been committed by the said Venayak Damodar Savarkar in 1906, the evidence produced on behalf of the Crown did not according to the law ordinarily administered at Bow Street Police Court raise a 'strong or probable presumption that the said Venayak Damodar Savarkar had committed the offences mentioned in the

warrant': (4.) that, as regards the offences alleged to have been committed by the said Venayak Damodar Savarkar in 1906, it would be unjust, or oppressive, or too severe a punishment to return the said Venayak Damodar Savarkar to India (*a*) because the said alleged offences are of a trivial nature, and (*b*) because in respect of such offences the application is not made in good faith in the interests of justice, seeing that the said alleged offences, if committed, were committed more than four years ago, and because some time previous to the departure of the said Venayak Damodar Savarkar from India to England his alleged commission of such offences, and his intended departure, and his whereabouts, both before and after his said departure, have always been known to the Crown, and no steps have been taken to prosecute him in respect of such offences until now, namely until four years afterwards: (5.) that, as regards the offences alleged to have been committed by the said Venayak Damodar Savarkar since July, 1906, it would be unjust, or oppressive, or too severe a punishment to return or to send the said Venayak Damodar Savarkar to India for trial, because (*a*) he has not been in India since May, 1906, (*b*) he has been in England ever since July, 1906, (*c*) the said Venayak Damodar Savarkar having been so resident, he has in respect of the said offences acquired the status of an ordinary British subject of His Majesty resident in England, (*d*) the acts alleged to have been committed by the said Venayak Damodar Savarkar, if committed, were all committed in England, and were acts constituting offences against the criminal law of England, and as such triable and punishable in this country, (*e*) there are witnesses whom the said Venayak Damodar Savarkar is desirous of calling in his defence, and whom it is important for him to call in his defence, and all such witnesses are in England, or on the Continent of Europe, and such witnesses will not attend to give evidence in his defence in India, whereas, so far as the evidence of the Crown is concerned, it is evidence of documents in the possession of its officers, and the oral evidence of persons every one of whom is either a servant of the Crown or a person in custody of the police, and the Crown will therefore be quite able to obtain their evidence upon a trial of the said Venayak Damodar

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Savarkar in England, (*f*) having regard to the provisions of the Indian Criminal Law Amendment Act (No. 14 of 1908) and the Order of the Governor-General of India in Council dated January 4, 1910, the trial of the said Venayak Damodar Savarkar in India may take place in circumstances and under conditions which are unknown to the laws of England and repugnant thereto."

Upon the argument on the order nisi for a habeas corpus the Divisional Court ordered it to be discharged. The matters alleged by (4.) and (5.) of the above-mentioned grounds were discussed during the argument and in the judgments given by the judges, who arrived at the conclusion that sufficient reason was not shewn for exercising any of the powers given to the Court by ss. 10 and 35 of the Fugitive Offenders Act, 1881. The order of the Court as drawn up, however, merely ordered that the order nisi should be discharged.

The applicant appealed against the order of the Divisional Court, the grounds of appeal set forth in the notice of appeal being substantially the same as those set forth in the rule nisi for a habeas corpus. (1)

(1) By the Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 10, "Where it is made to appear to a superior Court that, by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities for communication, and to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return the fugitive either at all or until the expiration of a certain period, such Court may discharge the fugitive, either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the Court seems just."

Sect. 35: "Where a person accused of an offence is in custody in some part of Her Majesty's dominions, and the offence is one for or in respect of which, by reason of the nature thereof or of the place in which it was committed or otherwise, a person may under this Act or otherwise be tried in some other part of Her Majesty's dominions, in such case a superior Court, and also if such person is in the United Kingdom a Secretary of State, and if he is in a British possession the governor of that possession, if satisfied that, having regard to the place where the witnesses for the prosecution and for the defence are to be found, and to all the circumstances of the case, it would be conducive to the interests of justice so to do, may by warrant direct the removal

June 16. *Sir Rufus Isaacs, S.-G.* (*Bodkin* and *Rowlatt* with him), for the respondent. There is a preliminary objection to the hearing of this appeal. The application for the writ of habeas corpus was made in a criminal cause or matter, and therefore under s. 47 of the Judicature Act, 1873 (1), no appeal lies from the decision of the Divisional Court. No doubt an appeal lies from the refusal of a writ of habeas corpus where the matters out of which the application arises are of a civil nature, but prima facie there is no right of appeal in a criminal cause or matter. In *Ex parte Alice Woodhall* (2) it was held that no appeal lay from the refusal of a Divisional Court to grant a writ of habeas corpus in the case of a person committed to prison under the Extradition Act, 1870, as a person accused of an extradition crime, the reason being the prohibition in s. 47 against an appeal in a criminal cause or matter. In *Reg.* v. *Young* (3) the same reasoning was applied in the case of an appeal from the refusal to make absolute a rule nisi for a mandamus to hear and determine a summons under the Weights and Measures Act, 1878. The present case, it is true, arises under the Fugitive Offenders Act, 1881, under which the appellant has been committed to prison in this country to take his trial in another part of His Majesty's dominions, but no trace is to be found in that Act of an appellate jurisdiction being given to this Court, and the principle of the decision in *Ex parte Alice Woodhall* (2) is decisive of the present case.

Arthur Powell, K.C. (*Parikh* with him), for the appellant. This Court has jurisdiction to hear this appeal. It is clear that

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of such offender to some other part of Her Majesty's dominions in which he can be tried, and the offender may be returned, and, if not prosecuted or acquitted, sent back free of cost in like manner as if he were a fugitive returned in pursuance of Part One of this Act, and the warrant were a warrant for the return of such fugitive, and the provisions of this Act shall apply accordingly."

Sect. 39: "In this Act, unless the context otherwise requires, ... the expression 'superior court' means (1.) In England, Her Majesty's Court of Appeal and High Court of Justice. . . . ."

(1) By s. 47 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), " . . . . no appeal shall lie from any judgment of the High Court in any criminal cause or matter, save for some error of law apparent upon the record . . . ."

(2) (1888) 20 Q. B. D. 832.

(3) (1891) 66 L. T. 16.

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prior to the Judicature Act, 1873, the common law right to apply for a writ of habeas corpus was not exhausted by a single application, but that the application, if unsuccessful, might be renewed before each Court and judge in succession: *Ex parte Partington.* (1) That Act, however, consolidated the Courts, and it then became possible to make only a single application to the High Court; if, therefore, the decision in *Ex parte Alice Woodhall* (2) is good law, the Act of 1873 has had the effect of seriously cutting down the safeguards for the liberty of the subject. Moreover, a right of appeal to the Court of Appeal is given by the Fugitive Offenders Act, 1881. By ss. 10 and 35 certain powers are given to a "superior Court," which expression is by s. 39 defined to mean "In England, Her Majesty's Court of Appeal and High Court of Justice." It must be inferred from this that it was the intention of the Legislature to confer upon the Court of Appeal an appellate jurisdiction in the case of applications made under the Act, as the present application was made; there was no other reason for including it in the definition of a superior Court. It is further submitted that under the Act of 1881 the Court of Appeal has both an original and an appellate jurisdiction, and, if necessary, the Court is asked to hear the application under the Fugitive Offenders Act, 1881, in the exercise of its original jurisdiction.

June 17. VAUGHAN WILLIAMS L.J. read the following judgment:—As this case is one of some importance, I think it desirable to set out in some detail the steps in the application to the Divisional Court and in the appeal to this Court. Venayak Damodar Savarkar moves by his counsel that the judgment of the King's Bench Division made in the matter of the Fugitive Offenders Act, 1881, and in the matter of the Habeas Corpus Acts and in the matter of *The King* v. *Governor of His Majesty's Prison, Brixton, Ex parte Venayak Damodar Savarkar*, dated June 3, whereby it was ordered that the rule nisi dated May 24 to the said governor of the said prison to shew cause why a writ of habeas corpus ad subjiciendum should not issue directed to the said governor to have the body of the said Venayak

(1) (1845) 13 M. & W. 679. (2) 20 Q. B. D. 832.

Damodar Savarkar before the said Court immediately to undergo and receive all and singular such matters and things as the said Court should then and there consider of and concerning him should be discharged, may be reversed, and that the said rule may issue upon the following grounds. [His Lordship read grounds 1 to 5 in the notice of appeal previously set out.] Having regard to the fact that a preliminary objection is made by the Crown that no appeal lies in the present case and that we are going to deal with that objection, it is not necessary that I should say more of these grounds than that, although the grounds, some of them, refer to the powers of superior Courts under the Fugitive Offenders Act, 1881, including amongst others the power of superior Courts to discharge a fugitive where it is made to appear to the Court that it is just that such order should be made upon any of the grounds mentioned in that Act, yet the appeal which it is sought to bring before us is nothing else than an appeal in respect of the refusal by the Court of the King's Bench Division to make absolute a rule nisi for a writ of habeas corpus issued in respect of the body of the appellant, who under a warrant of the magistrate at Bow Street Police Court is detained in Brixton prison charged with certain criminal offences, and the preliminary objection is that no appeal can be had in such a case having regard to the words of s. 47 of the Judicature Act, 1873, which enacts, inter alia, that "no appeal shall lie from any judgment of the High Court in any criminal cause or matter save for some error of law apparent upon the record."

There can be no manner of doubt, having regard to the decision of this Court in the case of *Ex parte Alice Woodhall* (1), that the decision of the King's Bench Division refusing to make absolute the order nisi for issue of a writ of habeas corpus in this case is a decision in a criminal cause or matter within the meaning of s. 47 of the Judicature Act, 1873; and it follows that, as this appeal relates to the said decision and nothing else, this preliminary objection is a good objection and must prevail.

It is desired on the part of the appellant to make to this Court an original motion or application asking for the exercise

(1) 20 Q. B. D. 832.

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by this Court as a superior Court within the meaning of the Fugitive Offenders Act, 1881, of certain powers given to superior Courts by that Act. This is a motion or application which can be made as of right without any leave from us, but a difficulty arises by reason of the limit of time during which the appellant can remain in England under the orders which have been made respecting his return to India, but the Solicitor-General on behalf of the Crown has thought it right to remove this difficulty by stating that these orders, so far as they relate to the time of the return of the appellant to India, shall be suspended in operation so as to enable the appellant to make this application to us under the Fugitive Offenders Act, 1881, and appeal (if he is allowed so to do and does it promptly) both in respect of the order of the King's Bench Division refusing to make absolute the rule nisi for a writ of habeas corpus and our decision on the preliminary objection, and also in respect of any order which this Court may make on the appellant's application to us under the Fugitive Offenders Act, 1881—which application we will hear at once this morning, if due notice of the grounds was given last night as arranged.

FLETCHER MOULTON L.J. I am of the same opinion. I might rest my decision on the simple ground that the judgment in *Ex parte Alice Woodhall* (1) is binding upon us and that it can only be reviewed in the House of Lords. But, looking to the importance of the present case, I think it desirable to state the grounds on which I have come to the conclusion that this appeal should be dismissed, independently altogether of the authority of that decision.

By s. 47 of the Judicature Act, 1873, it is provided (inter alia) that "no appeal shall lie from any judgment of the High Court in any criminal cause or matter, save for some error of law apparent upon the record, as to which no question shall have been reserved . . . ." I ask myself therefore whether the present appeal is an appeal in a criminal cause or matter. It is an appeal from the refusal of the Divisional Court to make absolute a rule nisi for a habeas corpus obtained on behalf of

(1) 20 Q. B. D. 832.

one Savarkar, who has been committed to prison upon certain charges under the Fugitive Offenders Act, 1881. The fact that it is an appeal from a refusal to make absolute a rule nisi for a writ of habeas corpus is not decisive; many cases of habeas corpus have nothing to do with anything of a criminal character. For the purpose of deciding whether it is in a criminal cause or matter I look at the grounds of appeal contained in the notice of appeal and in the original application to the Divisional Court. It will be sufficient for this purpose to read the second and fifth grounds. [His Lordship read the second and fifth grounds.] It seems to me impossible to contend that those grounds do not arise out of a criminal cause or matter, and if any portion of an application or order involves the consideration of a criminal cause or matter, it arises out of it, and in such a case this Court is not competent to entertain an appeal. Therefore, without reference to the decision of this Court in *Ex parte Alice Woodhall* (1), I come to the conclusion that this is an appeal from the High Court of Justice in a criminal cause or matter.

I must add, however, that I respectfully agree with the reasons given by the learned judges in their judgments in *Ex parte Alice Woodhall.* (1) The present case comes within the reasons given in each of those judgments. Lord Esher M.R. says (2), quoting from his own judgment in *Reg.* v. *Fletcher* (3), "I should read the clause as meaning 'no appeal shall lie from any decision of the High Court by way of judgment in any criminal cause or matter.' In the present case, I think I must try to express my meaning in other words. I think that the clause of s. 47 in question applies to a decision by way of judicial determination of any question raised in or with regard to proceedings the subject-matter of which is criminal, at whatever stage of the proceedings the question arises." That language precisely fits the present case. Lindley L.J. says (4), "Can we say that the application in the present case is not an application in a criminal cause or matter? I think that in substance it certainly is. Its whole object is to enable the

(1) 20 Q. B. D. 832.
(2) 20 Q. B. D. at p. 836.
(3) (1876) 2 Q. B. D. 43.
(4) 20 Q. B. D. at p. 837.

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person in custody to escape being sent for trial in America upon a charge of forgery." Altering the nature of the charge, and substituting India for America, that language fits the present case just as well as it did the case of *Ex parte Alice Woodhall.* (1) Finally, Bowen L.J. said (2), "How can the matter be other than criminal from first to last? It is a matter to be dealt with from first to last by persons conversant with criminal law, and competent to decide what is sufficient evidence to justify a committal. The questions upon which the application for a writ of habeas corpus depends, are whether or not there was evidence before the magistrate of a crime, which would be a crime according to English law, having been committed in a foreign country, and whether or not that evidence was sufficient to justify him in committing the accused for trial if the crime had been committed in England. These must be questions arising in a criminal matter; and it follows that the judgment given upon the application for a writ of habeas corpus is a judgment in a criminal matter." This language does not apply to all the grounds of appeal in this case with equal aptitude, but it certainly applies to some of them, and, as I have already said, if some of the grounds of appeal arise out of a criminal cause or matter, this Court is not competent to entertain an appeal from the Divisional Court.

BUCKLEY L.J. In the case of a person detained or imprisoned under an order made by a Court in the exercise of its criminal jurisdiction, an application for a writ of habeas corpus challenges the validity of the detention. The appellant is detained, under an order made by the chief magistrate at Bow Street, in Brixton prison prior to being sent to India for trial under the Fugitive Offenders Act, 1881. An order nisi for a habeas corpus was obtained on his behalf, but an application to make it absolute was refused, and the rule nisi was discharged. The present appeal is simply an appeal from that order; it is an appeal from the refusal of the habeas corpus, and it is nothing more. If that is so, this case comes within the principles of two prior decisions of the Court of Appeal, *Ex parte Alice Woodhall* (1)

(1) 20 Q. B. D. 832. (2) 20 Q. B. D. at p. 838.

and *Reg.* v. *Young*. (1) I do not criticize those decisions; they are binding upon us. They decide that such an appeal as the present will not lie. Mr. Powell does not deny this, but he says these decisions are open to review by the House of Lords, and he seeks to maintain his right to a habeas corpus upon certain provisions in s. 10 and s. 35 of the Fugitive Offenders Act, 1881, which I do not now stay to read, for they are of this nature only: that, whereas the writ of habeas corpus attacks the validity of the order of detention, these sections assume its validity but give nevertheless a power of mitigation to the superior Courts. On the present appeal we can express no opinion on this contention. The Act of 1881 gives to fugitive offenders certain statutory rights which have nothing to do with habeas corpus. The present matter is habeas corpus simpliciter, and this appeal must fail.

Appeal dismissed.

W. J. B.

Application was thereupon made by Savarkar's counsel to the Court of Appeal, as having original jurisdiction in the matter under the provisions of ss. 10 and 35 of the Fugitive Offenders Act, 1881, that Savarkar should not be sent or returned to India under that Act or at all, and for an order that he should be discharged either absolutely or on bail, or that the Court should make such other order in the premises as to the Court seemed just. The grounds stated in the notice of the application were substantially the same as grounds 1, 4, and 5 of those which have been set forth above.

Sir Rufus Isaacs, S.-G. (*Bodkin* and *Rowlatt* with him), for the respondent, took the preliminary objection that, the subject-matter of the application having been already adjudicated upon in the King's Bench Division, it was not competent for the applicant to make a similar application to the Court of Appeal. It is true that the application made, and refused, in the King's Bench Division was in form for a habeas corpus, but it involved a decision of the matters arising under ss. 10

(1) 66 L. T. 16.

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and 35 of the Fugitive-Offenders Act, 1881. Under that Act, it is contemplated that there may be an application for a habeas corpus, and ss. 10 and 35 of the Act give power to a "superior Court," to which the application for a habeas corpus is made, although they are of opinion that the imprisonment of the applicant is legal, to do what they otherwise would be unable to do by way of relief to the applicant, if they think the circumstances require it. It has hitherto been the practice that any application for the exercise of the jurisdiction under those sections should be made, and disposed of, upon the application for a habeas corpus. The Act apparently contemplates that the matter should be dealt with in that way. An application such as is now made was really involved in the application for a habeas corpus. Ordinarily all that could be considered upon an application for a habeas corpus would be the question whether the prisoner was lawfully imprisoned, but under this Act the Court, apparently, must, on the application for a habeas corpus, consider any circumstances which may entitle the prisoner to relief under s. 10 or s. 35. It appears from the affidavit on which the rule nisi for a habeas corpus was moved, and from the arguments and the judgments of the learned judges, that an application under these sections was made upon the proceedings for a habeas corpus, and disposed of in the judgments.

[VAUGHAN WILLIAMS L.J. It does not appear that the application under these sections of the Fugitive Offenders Act, 1881, must necessarily be made upon an application for a habeas corpus.

FLETCHER MOULTON L.J. Apparently circumstances such as are contemplated by these sections as grounds for relief under them might in some cases arise after the application for a habeas corpus has been dismissed.]

In such case, an application could be made to a Secretary of State. The cases seem to shew that the practice hitherto has been that such applications should be made upon proceedings for habeas corpus. But, assuming for the purposes of the present case that such an application may be made otherwise than upon the proceedings for a habeas corpus, and that the Court of Appeal has jurisdiction in the matter as a Court of first

instance, it is submitted that there cannot be an application to the Court of Appeal as such a Court, after the matter has been heard and determined in another Court of first instance, as was the case here.

[VAUGHAN WILLIAMS L.J. In order to support that contention, it would be necessary to shew that the matter was res judicata, but, apparently, that could only be so if there were a judgment of the Court refusing relief asked for under ss. 10 and 35.]

The order discharging the rule for a habeas corpus, having regard to the terms of the affidavits, really imports a refusal of relief under ss. 10 and 35. It is submitted that the Act, on the construction now assumed to be correct, means that there may be an application either to the High Court or the Court of Appeal, but not to one after the other. If it were otherwise, the applicant might, in the first instance, apply to the Court of Appeal, and, after that application had been refused, apply to the High Court, which could not have been the intention. [He also cited *Rex* v. *Vyner* (1); *Reg.* v. *Spilsbury.* (2)]

Powell, K.C., and *Parikh* were not called upon to argue against the preliminary objection.

VAUGHAN WILLIAMS L.J. Having regard to the nature of this case and to the points which have been raised and argued in reference to it, I think it is desirable to state somewhat fully the reasons why, in my opinion, we have jurisdiction to entertain this application. I start with the assumption that, under the Fugitive Offenders Act, 1881, there is concurrent jurisdiction to deal with such an application in each Court which comes within the definition of a "superior Court" given by the Act, and therefore we have power to deal with such an application as a Court of first instance. I do not think that it is necessary to state at any length the reasons which have induced me to come to this conclusion. It is sufficient to say that the statute gives to a "superior Court" power to entertain such an application under the Act; and, by the definition given in the Act, the expression "superior Court" means in England "Her Majesty's Court of Appeal and High Court of Justice." This being so,

(1) (1903) 68 J. P. 142. (2) [1898] 2 Q. B. 615; 19 Cox, C. C. 160.

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in the absence of anything to qualify the effect of this provision in the rest of the Act, it necessarily gives to each of the Courts which come within the category of a "superior Court," as defined by the interpretation clause, jurisdiction to deal with such matters on the same basis, not on the basis that one is a Court of first instance and the other is a Court of Appeal. It appears to me that it cannot be that the Court of Appeal, having regard to the provisions of s. 47 of the Judicature Act, 1873, was intended to exercise appellate jurisdiction in respect of matters arising under an Act dealing entirely with procedure in a certain class of criminal prosecutions.

Having said this much, I will say only a few words on the question whether or not, under the system of law existing under the Judicature Act, 1873, or the terms of this particular statute, it would be competent for one Court after another to deal with successive applications for a habeas corpus, as it was according to the old practice. I think that, with reference to that question, one must divide applications for a habeas corpus into two classes. There are applications for a habeas corpus which form part of the proceedings in a criminal matter; and there are applications for a habeas corpus which are purely civil proceedings, and have no relation whatever to criminal matters. The prohibition of an appeal to the Court of Appeal applies to one category, and not to the other. The decision of the King's Bench Division as to the issue of a writ of habeas corpus is not final, unless the application for the habeas corpus forms part of the proceedings in a criminal case. The exception by s. 47 of a criminal cause or matter from the general right of appeal given by the Judicature Act, 1873, does not, as I understand it, apply to an application for a habeas corpus in a civil proceeding. Under the circumstances of the present case I do not think that it is necessary for us to decide anything on the question whether the right, which existed before the Judicature Acts, of going to each judge or Court of competent jurisdiction, one after the other, for the purpose of attempting to procure the liberty of a person detained by application for a habeas corpus, still exists. That right certainly existed prior to the Judicature Act. Whether there is anything in that Act to take it away, or whether, bearing

in mind the nature of the Fugitive Offenders Act, 1881, s. 47 of the Judicature Act, 1873, would apply to the question in a case of this kind, I do not feel bound to decide in this case, though I am disposed to think that there might be some ground for arguing that the decision in the case of *Ex parte Alice Woodhall* (1) looks as if, in principle, it would be equally applicable to any other decision in criminal proceedings which would have the result of an appeal. I do not think it is necessary to go into that question in the present case, because upon the materials before us it does not seem to me to arise.

It is argued here, by way of preliminary objection, that, whatever the law may now be in respect of the right to apply for a habeas corpus to one Court after another, it was not competent, under the present procedure, or indeed under any prior procedure, in a case like the present for an applicant to come to this Court after the matter has previously been disposed of, and so become res judicata, in another Court. It is suggested that, not only was there an application by the applicant to the High Court to have the question of his claim to certain relief of the nature contemplated by ss. 10 and 35 of the Fugitive Offenders Act, 1881, disposed of, but that this application was heard and disposed of, and that the matter is therefore under these circumstances res judicata, and he is estopped from making any application that is inconsistent with the judgment which he so applied for and obtained. In my opinion this preliminary objection fails, because we are not in a position to say that he asked for and did obtain an adjudication in respect of the matters now in question in the King's Bench Division. So far as the form of the procedure is concerned, it does not appear that he made any such application as the present in the Divisional Court. He obtained a rule nisi for a habeas corpus. The only question on that was whether or not the rule for the issue of a writ of habeas corpus should be made absolute or discharged. I look at the judgment—I do not mean the words spoken by the judges, but the actual order drawn up as of record. That does not refer in any way to the matters involved in the present application. It is urged that, if we look

(1) 20 Q. B. D. 832.

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at the argument and at the affidavit upon which the rule was moved, and the words of the judgments, in the sense of the words spoken by the judges, it will appear that these matters were discussed and disposed of in the King's Bench Division. There seems to be ground for saying that these matters were discussed in the oral judgments, but I think that for the present purpose we can only look at the matters which not only were discussed, but were dealt with by the order of the Court as drawn up. I look at that order, and find nothing adjudged therein concerning the matters with which the present application is concerned. There has been a good deal said about the practice of the Court in relation to matters of this kind. I need not, I think, discuss the question whether the application to obtain the benefit of s. 10 or s. 35 of the Fugitive Offenders Act, 1881, cannot be made at a time other than that at which the application for a habeas corpus takes place, because in the course of the argument it became obvious, as it appeared to me, that it could be so made, seeing that many of the circumstances which might entitle a fugitive offender to make the application are circumstances which manifestly might arise subsequently to the time at which the question of making absolute or discharging the rule nisi for a habeas corpus had been decided. I mention this point because the Solicitor-General, though he did not argue it for the purposes of the present case, said that he could not abandon the point as regards the future, no doubt because of the view taken in the Crown Office as to the practice.

The ultimate conclusion at which I arrive is that the applicant is entitled to make this application to us, first, because an application such as this may be made to any Court which comes within the definition of a "superior Court" given by the Fugitive Offenders Act, 1881; and secondly because, assuming that no such application could be entertained after the matter had once been adjudicated upon by a superior Court, in my opinion, we must look for such an adjudication in the record of the Court, and not only does that record not shew any application by the applicant for relief under s. 10 or s. 35 of the Act, but there is no order of the Court shewing that such an application was ever adjudicated upon in this case.

FLETCHER MOULTON L.J. In this case application is made to this Court to exercise the jurisdiction given by the Fugitive Offenders Act, 1881, s. 10. The preliminary objection is taken that it is not competent for us to entertain the application. In my opinion that objection fails.

In the first place I am satisfied that under ss. 10 and 35 of the Fugitive Offenders Act, 1881, jurisdiction is given to this Court to hear an application of this kind, and that this jurisdiction is a jurisdiction concurrent with that of the High Court, both this Court and the High Court being included in the designation "superior Court" by virtue of the definition of that expression in s. 39 of the Act.

That being so, the objection taken to our hearing this application must be, not that the Court would have no power to entertain an application of this kind, if it were res nova and were made to it in the first instance, but that by reason of events which have happened the Court no longer has that power. For the purpose of establishing this counsel for the respondent relied upon the following facts, namely, that a rule nisi for a habeas corpus was obtained in the King's Bench Division on the application of the prisoner upon a certain affidavit, which is part of the material on which this application is made; that subsequently, after an argument in that Court, that rule was discharged; and that the judgments pronounced by the judges upon that occasion dealt with the various points which will be raised upon the present application to this Court. It is contended that, under these circumstances, we are bound by what was then decided, and that the matter is res judicata as between the Crown and the prisoner.

I do not propose to base the conclusion at which I have arrived, namely, that, in spite of the events which I have mentioned, we have jurisdiction to deal with the application, upon any decision on the question whether it would be competent for a prisoner under the provisions of the Act of 1881 to apply to one Court after another as used to be done in applications for a habeas corpus. I express no opinion upon that question. I base my conclusion that this Court is competent to entertain this application solely upon the ground that the

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proceedings in the King's Bench Division have resulted in no adjudication upon the matter of this application, so that it remains res integra for the purposes of the present application to this Court.

It is desirable here to say a few words as to the practice with regard to the writ of habeas corpus, the proceedings upon the application for which in the King's Bench Division are alleged to be a bar to the present application. Of old the writ seems to have been issued as of right upon an ex parte application, and it was upon the return to the writ that the question as to whether the prisoner's detention was legal or not was discussed, and adjudicated upon by the Court. After a time the Courts ceased to grant the writ as a matter of right on a mere unsupported application, and it became the practice to require that an affidavit should be made, setting forth the facts upon which the application for the writ was based. For a long time nothing beyond such an affidavit appears to have been required. In later times the practice was adopted of granting only a rule nisi for the issue of the writ in the first instance as being the more convenient course. The application for that rule nisi was on affidavit, and, if prima facie grounds for the issue of the writ were shewn, the rule nisi was granted. The argument took place upon the motion to make it absolute, and, according to the result of that argument, the Court made the rule absolute or discharged it, as the case might be. But it was open to the party called upon by the rule to shew cause not to oppose the issue of the writ, in which case the rule would be made absolute, and a writ of habeas corpus would then issue, and an answer might be made to it upon the return. After the passing of the Extradition Act, 1870, a change appears to have been made for convenience' sake in the practice which had previously prevailed in extradition matters, and in the report of the case of *Reg.* v. *Ganz* (1) the Attorney-General of that day is stated in a note to have pointed out that since 1873 the practice in such cases had been to obtain a rule nisi for a habeas corpus, and to argue the case on the rule, and that such practice was far more convenient. I believe that in subsequent cases of the same kind the practice usually followed has

(1) (1882) 9 Q. B. D. 93.

accordingly been that, if on the argument of the rule it is made absolute, the case is treated as having been disposed of on the rule, and no question is raised on the return to the writ. The result appears to have been that a practice has arisen, for which I can find no justification, by which questions of relief (having nothing in truth to do with the right to the issue of the writ of habeas corpus) have been discussed upon the argument of the rule for the habeas corpus. That practice was followed in the present case; and, on reference to the actual rules in *Reg.* v. *Spilsbury* (1), it appears to have been followed in that case also, although by the report in the *Law Reports* it is made to appear as if there had been in that case an alternative application for relief under the Fugitive Offenders Act, 1881. In that case, a rule nisi for a habeas corpus or for an order to admit the prisoner to bail having been obtained, an argument took place on the motion to make that rule absolute. The Court discharged the original rule nisi, but gave judgment granting certain relief under the provisions of the Fugitive Offenders Act. I do not know whether or not this was done by virtue of some consent that the case should be treated as if the rule included an application for such relief, but I am satisfied that, so far as the argument on the rule nisi was concerned, the only matter properly before the Court was whether that rule should be made absolute or discharged, and any matters beyond that could only have been brought in by consent. In the interests of justice, it is not desirable that the practice of introducing such matters by consent in an informal way should be adopted in a case where the liberty of the subject is involved. In my opinion, the relief which the Court is empowered to give under ss. 10 and 35 of the Fugitive Offenders Act, 1881, ought to be made the subject of a substantive application to the Court. Such relief has in reality nothing to do with relief by habeas corpus; it can be obtained by an independent application to the Court; and I think it was the intention of the statute that it should be so. But, if an application for such relief is intended to be made to the Court in conjunction with an

(1) [1898] 2 Q. B. 615.

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application for a writ of habeas corpus, the rule nisi ought to be moved for in an alternative form.

In the present case many of the points which will be raised on the present application were argued before the Divisional Court and were raised by the affidavit filed on behalf of the applicant; but, when I look at the record of the proceedings, I find nothing beyond the fact that a rule nisi for a habeas corpus was obtained, and that the judgment of the Court on the argument of the rule was that it should be discharged. Upon the records of the Court nothing appears to have been adjudicated upon but the right of the applicant to a writ of habeas corpus. The application now made to this Court is not for any relief which could be given by way of habeas corpus. We have not to decide whether the King's Bench Division were right or wrong in refusing to grant that writ. Therefore it must be taken that the questions raised by the present application have not been heard and decided in proceedings properly raising them before a Court of concurrent jurisdiction; and consequently, without deciding whether, if they had been so heard and adjudicated upon, it would have prevented us from hearing this application, it is open to us to treat the matter as res nova, and not res judicata.

BUCKLEY L.J. Sects. 10 and 35 of the Fugitive Offenders Act, 1881, confer upon a "superior Court" under certain circumstances certain powers. They are sections addressed to the case in which the detention or imprisonment of the fugitive offender is legal, and in which, if a rule nisi for a habeas corpus has been obtained, the rule must be discharged. It by no means follows, in my opinion, that applications under these two sections cannot or ought not to be adjudicated upon on the habeas corpus application; on the contrary, I think that they both can and ought to be so adjudicated upon. The order of the magistrate under the Fugitive Offenders Act, 1881, has a double operation; it commits the fugitive to prison; and then, as the result of that, by operation of the statute, the man is deported and returned to another place. The question which is raised upon the application for a habeas corpus is whether the fugitive is

validly imprisoned or detained, and that which is raised under ss. 10 and 35 is whether, it having been found that he is lawfully detained, he ought or ought not to be deported.

Under s. 10, the application, so far as I see, would always be made by the prisoner; it is an application which is for his benefit. The application under s. 35 might, I think, be made either by the prisoner or by the Crown. I do not suggest that it would often be made by the Crown. The Crown has it in its power to give effect to the section without application to any Court, because the order under that section may be made by a Secretary of State; but, on the other hand, it might very well be that, upon the application for the habeas corpus, the Crown would say that it would be more convenient that the prisoner should be tried in one place than in another. In any case, it seems to me that the questions as to whether those sections should be applied, and how they should be applied, can very well be adjudicated upon concurrently with the application for a habeas corpus.

Looking now to see what is exactly the application which the prisoner in this case has made, the materials appear to be as follows. When application is made for the rule nisi, there is no notice of motion, the application being ex parte. Then the rule nisi is obtained in a certain form; it is returnable as a matter of course; and there is no notice of motion on the return. Thus far, therefore, there are no materials for ascertaining what the prisoner has asked for beyond that which is contained in the rule nisi itself. I think I am entitled to read the rule nisi as, in fact, shewing that the prisoner has asked for, and the Court has thought proper to grant, that which is found in the rule nisi. Then further, I am, I think, entitled to consider what was in fact asked for at the Bar on behalf of the prisoner, when his application came on for hearing. In order to see what the Court has done, I am, of course, entitled to read the judgments of the judges to see what contentions they have accepted, and with respect to what subject-matters they have given their reasons. But, after all, when all is said and done, the conclusion of the whole matter is the order which the Court has ultimately made, and the only matter which, in my opinion, can be treated

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as adjudicated upon is that which is contained in the order of the Court.

Using the materials which I have mentioned, it seems to me that the prisoner here did apply to the Court to consider what ought to be done for his relief under s. 10 of the Act. Part of the materials available is his own affidavit, which clearly points to such an application. I am also entitled to gather from the arguments which were addressed to the King's Bench Division, and the judgments which were delivered by the learned judges in that Court, what order he asked for and what they considered. On looking at those judgments I cannot doubt myself that the King's Bench Division were invited to consider what should be done for the relief of the prisoner under s. 10; and it seems to me that the judges gave reasons as to what they ought to do or ought not to do under s. 10. I regret very much that under those circumstances I do not find myself in a position to say that the King's Bench Division adjudicated upon this matter. I am, I think, precluded from so saying by the fact that their order as drawn up is an order which does nothing whatever beyond discharging the rule nisi. Whatever the judges may have said, there has been no adjudication except upon that matter.

Under these circumstances it appears to me that the application, although it was made to the Court, as I think it could be, upon the application for the habeas corpus, has unfortunately not resulted in an order of which the Solicitor-General can avail himself for the present purpose. I do not know that the difficulty is one which need arise in every case. It seems to me that this order ought to have been drawn up in a different form; and, if the parties had been, as I believe in the King's Bench Division they are not, before an official of the Court when the order was drawn up, it seems to me that those who represented the Crown would have been entitled to have inserted in the order an adjudication on this question, and in that way in future cases the difficulty which has arisen in this case may be avoided. But there is nothing of the kind in this order, and under those circumstances there is no order of the Court, so far as I can see, adjudicating upon the matter.

There is one other point upon which I wish to say a word. It is this: it would be another possible objection to the original motion which, as the result of this judgment, we are going to hear that, where the Act of 1881 refers to the "Court of Appeal" as a "superior Court," it means that Court sitting as a Court of Appeal. The learned Solicitor-General has not thought fit to argue that point. I agree with what Vaughan Williams L.J. has said to the effect that we must for ourselves determine that point in order to hear this motion. As my two brothers think that that point is to be resolved in favour of our hearing the motion, of course that decides the matter. For my own part, I have not heard the matter argued, and will only say that I think it a question of very considerable difficulty whether, when this Act speaks of the "Court of Appeal," it does not mean the Court of Appeal sitting as a Court of Appeal. It is unnecessary for me to say more as to this point, because the other members of the Court do not think that is the meaning. Under these circumstances I do not think that the preliminary objection can be upheld.

The application was then heard and ultimately was dismissed.

Application dismissed.

Solicitor for applicant: *R. Vaughan.*
Solicitor for the Crown: *Director of Public Prosecutions.*

E. L.

C. A.

1910

June 3;
July 23.

[IN THE COURT OF APPEAL.]

GORDON *v.* CHIEF COMMISSIONER OF METROPOLITAN POLICE.

Illegality—Gaming—Street Betting—House used for Betting—Seizure in House by Police of Proceeds of Street Betting—Action to recover Money—Street Betting Act, 1906 (6 *Edw.* 7, *c.* 43)—*Betting Act*, 1853 (16 *&* 17 *Vict. c.* 119), *ss.* 11, 12—*Metropolitan Police Act*, 1839 (2 *&* 3 *Vict. c.* 47), *s.* 48.

The plaintiff deposited in a house, which was occupied by a person employed by him, money, which was the proceeds of street betting operations carried on by him. In pursuance of a warrant issued under the Betting Act, 1853, s. 11, the police entered the house, and seized therein a number of betting slips and the aforesaid money. The plaintiff and his above-mentioned employee were subsequently prosecuted for using the house as a gaming house. The plaintiff's employee was convicted, but the plaintiff was acquitted of the charge. The Chief Commissioner of the Metropolitan Police having refused to give up the aforesaid money, the plaintiff brought an action against him to recover the same. At the trial, the defence having been set up by the defendant that the money belonged, not to the plaintiff, but to his above-mentioned employee, the plaintiff, who was called as a witness, in rebutting that defence disclosed the fact that he had obtained the money by street betting. The learned judge at the trial found that the detention of the money was originally lawful as being requisite for the purposes of the prosecution; and he held that the maxim "Ex turpi causa non oritur actio" applied, and that the plaintiff could not therefore recover:—

Held, reversing the decision of the learned judge, that, the plaintiff's cause of action not being shewn to arise out of any illegal transaction, he was entitled to recover.

Appeal from the judgment of Warrington J. in an action tried by him without a jury.

The action was brought by the plaintiff against the defendant in his official capacity as Chief Commissioner and Receiver of the Metropolitan Police Force to recover moneys amounting to 107*l.* 6*s.* 8*d.* detained by him.

The plaintiff by his statement of claim alleged that the defendant on or about November 28, 1908, wrongfully seized and took possession of certain money the property of the plaintiff, amounting to the sum of 107*l.* 6*s.* 8*d.*, and had since that date wrongfully retained the same, whereby the plaintiff had lost

the use and possession of the said sum and had suffered damage. Alternatively the plaintiff alleged that the defendant received the said sum of 107*l.* 6*s.* 8*d.* to the use of the plaintiff.

The defendant by his defence denied the plaintiff's allegations and pleaded, alternatively, that the said moneys had been received by one Arthur Jones directly or indirectly on dates unknown to the defendant as deposits on bets or as consideration for paying bets on certain premises, to wit, 19, Grove Street, Deptford, which said premises were then being kept and used by the said Arthur Jones as a common gaming house, and that the said moneys were found therein on November 28, 1908, by Cornelius Garner, a sub-divisional inspector in the Metropolitan Police Force, and lawfully seized by him acting under a warrant dated November 28, 1908, and in pursuance of his duty, and that this was the alleged wrongful seizure, and that, the said Arthur Jones having been duly convicted according to law on February 19, 1909, at the London County Sessions, such moneys became payable to the Receiver for the Metropolitan Police district, and that this was the alleged wrongful detention.

The action was tried with witnesses by Warrington J., sitting as an additional judge of the King's Bench Division.

According to the evidence given by the plaintiff at the trial, the facts were as follows. The plaintiff, who was a bookmaker, was in the month of November, 1908, conducting street betting operations in the neighbourhood of a house, No. 19, Grove Street, Deptford. That house was in the occupation of one Arthur Jones. Jones and the plaintiff's brother, Charles Gordon, and one David Turner were together engaged in the practice of street betting. Jones and Charles Gordon were the plaintiff's salaried servants, Turner being paid also, but as a "scout." The house No. 19, Grove Street, Deptford, was, according to the plaintiff's evidence, used, not as a betting house, but merely as a place of refuge in case the police came along the street. On November 28, 1908, the plaintiff had received, either by himself or through his two servants, Arthur Jones and Charles Gordon, the sum of money in question, and that sum of money had, according to their usual practice, been placed in one of the rooms in this house, 19, Grove Street, Deptford. On November 28, 1908, the

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police "raided" the house under the authority of a warrant issued under s. 11 of the Betting Act, 1853, and there seized not only the betting slips and other documents which they found in the house, but also the sum of money in question. For the purposes of the case the learned judge accepted the statement of the police inspector who seized the money that it was in his opinion required for the purposes of the trial of the aftermentioned charge brought against the plaintiff, Arthur Jones, Charles Gordon, and Turner under the Betting Act, 1853, and assumed that the detention of the money was originally lawful.

The plaintiff, Arthur Jones, Charles Gordon, and Turner were afterwards prosecuted for using the house 19, Grove Street as a betting house. The plaintiff was acquitted, on the ground that there was no evidence that he had taken bets in the house. The others were convicted. The plaintiff subsequently to his acquittal claimed a return of the money seized, but the defendant refused to return it, claiming that it had become forfeited under s. 48 of the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47). At the trial, the plaintiff, who was called, in order to rebut the defence that the money belonged not to him but to Arthur Jones gave evidence to the effect that the money in question was the proceeds of his street betting transactions.

The learned judge accepted the account given by the plaintiff as to the money being his, and held that it had not become forfeited as alleged under the Metropolitan Police Act, 1839, s. 48, because the procedure required by that section with regard to its seizure had not been complied with, but he held that, inasmuch as the plaintiff had acquired the money by bets in the street, which were illegal transactions, the maxim "Ex turpi causa non oritur actio" applied, and the plaintiff was not entitled to invoke the assistance of the Court for the recovery of the money. He therefore gave judgment for the defendant.

H. J. Turrell (with him *A. R. Stephens*), for the plaintiff. The defendant set up, by way of defence, in the Court below that the money in question did not belong to the plaintiff, but to Jones, and that he was entitled under the circumstances to retain the money, as Receiver of the Metropolitan Police Force, under s. 48

of the Metropolitan Police Act, 1839. The learned judge found that the money was the plaintiff's, and that the retention of it by the defendant was not justified by the provisions of the Metropolitan Police Act, 1839, and so negatived those grounds of defence; but it was further contended by the defendant that, as the plaintiff, in order to make out his title to the money, had admitted that he had acquired it by illegal transactions, namely street betting, he could not maintain the action; and the learned judge held, on the authority of *Scott* v. *Brown, Doering, McNab & Co.* (1), that the principle expressed in the maxim "Ex turpi causa non oritur actio" applied, and therefore this contention must prevail. It is submitted that in so holding he was wrong. This principle only applies where the illegal transaction is essential to the title or claim of the plaintiff. Here the plaintiff's title to the money as against the defendant did not depend upon the illegal transactions through which he acquired it. The money having been so acquired was his as against the world, and there was really no occasion for him to set up the illegal transactions by which it was acquired in order to make a title to it. It was none the less his money as against the defendant because he had originally acquired it by street betting.

J. E. Bankes, K.C., and *G. A. Scott*, for the defendant. The principle embodied in the maxim "Ex turpi causa non oritur actio" is not necessarily confined to cases in which the title or claim of the plaintiff can be said to depend upon an illegal transaction. If the plaintiff is, in the evidence which he brings forward to substantiate his title to money claimed, obliged to reveal the fact that it was originally acquired by means of an illegal transaction, then it is against the policy of the law that the Court should assist him in the recovery of that which he has so acquired. Here the issue being whether this money belonged to the plaintiff or to one of the other men charged with keeping a gaming house, the plaintiff found himself obliged, in order to negative the title of the other man, to shew how he had acquired the money. The cases shew that in such a case the Court will not lend its aid in favour of a title to establish which it is necessary to investigate an illegal transaction. In the

(1) [1892] 2 Q. B. 724.

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circumstances of this case the money might have been seized under the Metropolitan Police Act, 1839, s. 48. It is true that the warrant under which the police "raided" the house in this case was issued under the Betting Act, 1853, s. 11, which does not authorize the seizure of money, but that does not affect the argument based upon public policy. This is money which might have been seized under s. 48 of the Metropolitan Police Act, 1839, as being found in a gaming house, and, upon the conviction of those who were keeping the house, would prima facie have been forfeited to the Metropolitan Police Fund. Prima facie the conditions upon which this money might have become forfeitable to the police fund were fulfilled, and that being so, it is against public policy that any one should be allowed to come forward and avoid that forfeiture by proving that he had acquired that money by illegal street betting. The plaintiff was not in possession of this money: it was in a house in the charge of his servants, who were convicted of keeping the house as a gaming house. Assuming that the plaintiff could have succeeded by setting up a mere possessory title, he did not do so, but himself elected, in order to prove his title to the money, to set up that he had acquired it by street betting. Under these circumstances the doctrine "Ex turpi causa non oritur actio" applies, and he cannot recover. [They cited *Simpson* v. *Bloss* (1); *Cleaver* v. *Mutual Reserve Fund Life Association* (2); *Bice* v. *Jarvis*, *Garland & Kent*, *Peel and Receiver for Metropolitan Police District* (*Garnishees*). (3)]

H. J. Turrell for the plaintiff in reply. The cause of action in this case does not arise from the plaintiff's having made bets in the streets, but from the defendant's having wrongfully seized money that belonged to the plaintiff. It is impossible that, where a person wrongfully takes another's moneys or goods, the claim of that other to recover the same can depend on the manner in which he acquired his title to them. [He cited *Sykes* v. *Beadon* (4); *Farmer* v. *Russell* (5); *Bousfield* v. *Wilson*. (6)]

Cur. adv. vult.

(1) (1816) 7 Taunt. 246.
(2) [1892] 1 Q. B. 147.
(3) (1885) 49 J. P. 264.
(4) (1879) 11 Ch. D. 170, at p. 194.
(5) (1798) 1 Bos. & P. 296.
(6) (1846) 16 M. & W. 185.

July 23. VAUGHAN WILLIAMS L.J. read the following judgment:—The statement of claim in this case is as follows: "(1.) The defendant on or about the 28th day of November, 1908, wrongfully seized and took possession of certain money, the property of the plaintiff, amounting to the sum of 107*l.* 6*s.* 8*d.*, and has since the said 28th day of November, 1908, wrongfully detained the said sum of 107*l.* 6*s.* 8*d.* the property of the plaintiff, whereby the plaintiff has lost the use and possession of the said sum of 107*l.* 6*s.* 8*d.*, and has suffered damage. (2.) Alternatively, the plaintiff says that the defendant received the said sum of 107*l.* 6*s.* 8*d.* to the use of the plaintiff. Particulars—28 November, 1908. The defendant took possession of the said sum of 107*l.* 6*s.* 8*d.*, and has since retained possession of the same, wherefore the plaintiff says the said sum of 107*l.* 6*s.* 8*d.* was received by the defendant to his use. The plaintiff claims (1.) return of the said sum of 107*l.* 6*s.* 8*d.* and damages for its detention; (2.) alternatively, the sum of 107*l.* 6*s.* 8*d.* as money had and received."

I think the facts found by Warrington J. may be summarized thus: First, the plaintiff is a man who with the assistance of three servants, Arthur Jones, Charles Gordon, and David Turner, was in the month of November, 1908, conducting street betting operations in the neighbourhood of 19, Grove Street, Deptford. Secondly, the plaintiff on November 28 received, either himself or through his paid servants, the sum of money sought to be recovered in this action, and, according to the usual practice, placed this sum (that is, these actual coins) thus received by him, the plaintiff, in the course of this street betting in one of the rooms of 19, Grove Street, Deptford. This money was the result of the street betting which I have described above —that is, was the result of a transaction prohibited by the Street Betting Act, 1906. Thirdly, the house, 19, Grove Street, was used by the plaintiff not as a betting house, but as a refuge in case the police came along the street. Fourthly, on the authority of a warrant issued under s. 11 of the Betting Act, 1853, the police "raided" the house, 19, Grove Street, and seized not only betting slips and documents, but also the money in question in this action. The warrant issued under s. 11 does

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not authorize the seizure of money, but Warrington J., for the purposes of this case, finds that the detention of the money was lawful as being required for the purposes of the trial—that is, the trial on the charge of keeping a betting house. Fifthly, proceedings were taken against the plaintiff, Arthur Jones, the occupier of 19, Grove Street, and Charles Gordon and David Turner for using the house as a betting house. The plaintiff was acquitted, and the others were convicted. Sixthly, there was a suggestion made that the money in question in this action was forfeited under s. 48 of the Metropolitan Police Act, 1839, but Warrington J. held that no forfeiture had taken place, s. 48 being a penal section the provisions of which had not been strictly carried out.

Warrington J., on the basis of the facts and rulings which I have set forth, says (1): "Now the plaintiff sues the Chief Commissioner of Police for the return of the 107*l.* 6*s.* 8*d.* In order to establish his title to the money, which is put in issue, he has proved that the money was the result of an unlawful act on his part, and one prohibited by statute; and the defendant relies on this—that, since the plaintiff in proving his title to recover has proved that the money was the result of an illegal transaction, the Court has no right to lend him its assistance, and ought to dismiss the action on that ground." He then cites *Holman* v. *Johnson* (2) and quotes from the judgment of Lindley L.J. in *Scott* v. *Brown, Doering, McNab & Co.* (3) a passage which runs thus: "'Ex turpi causa non oritur actio.' This old and well-known legal maxim is founded in good sense, and expresses a clear and well-recognized legal principle, which is not confined to indictable offences. No Court ought to enforce an illegal contract, or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence

(1) The Lord Justice read from shorthand writer's note of the judgment.

(2) (1775) 1 Cowp. 341.

(3) [1892] 2 Q. B. 724, at p. 728.

adduced by the plaintiff proves the illegality, the Court ought not to assist him." And Warrington J. goes on to say: "In this case the fact of the mode in which the money is alleged to have become the property of the plaintiff is brought to the notice of the Court by the plaintiff himself, and the plaintiff has himself proved that he was engaged in that illegal transaction. In these circumstances, I think that I should be departing from the principles which have been laid down if I held that the plaintiff was entitled to recover. It is said that the principle is only applicable where the plaintiff is seeking to enforce a right arising out of contract or quasi-contract, and that it does not extend to a right of property, but I can find no such limitation. . . . . Where the illegality is a necessary fact, the principle applies whether the right arises out of contract or in some other way."

The questions which seem to arise on this judgment are, first, does the principle of the maxim "Ex turpi causa non oritur actio" apply where the plaintiff is seeking to enforce a right other than a right arising out of contract? Secondly, what is the effect of the finding of Warrington J. as to the plaintiff's property?

Now, as to the first question, I do not think that the application of the maxim "Ex turpi causa non oritur actio" is limited to cases in which a plaintiff is seeking the assistance of a Court of justice for the purpose of enforcing an illegal contract or a contract springing out of an illegal transaction. The maxim clearly is not limited to actions to enforce contracts which by their terms bind the parties to do that which is prohibited and illegal. It extends to contracts which by their terms are not illegal but which arise out of an illegal transaction. In other words, it applies not only where the contract is on its face illegal, but also where the contract is opposed to public policy as arising out of an illegal transaction. It follows, then, that money won at playing an illegal game cannot be recovered. The action, however, in such a case is an action for a breach of contract arising out of an illegal transaction. The rule of law upon which Courts of law refuse their assistance is stated thus by Lord Mansfield in *Holman* v. *Johnson* (1): "No Court will lend its aid to a man who

(1) 1 Cowp. at p. 343.

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founds his cause of action upon an immoral or illegal act. If from the plaintiff's own stating or otherwise the cause of action appears to arise ex turpi causa or the transgression of a positive law of this country, there the Court says he has no right to be assisted." In the case of *Taylor* v. *Chester* (1), which was a case decided not upon the maxim "Ex turpi causa non oritur actio," but upon the cognate maxim "In pari delicto potior est conditio possidentis," the plaintiff, having deposited the half of a 50*l.* note by way of pledge to secure the payment of money due to the defendant for wine supplied in a brothel to be consumed by prostitutes for the purpose of inciting debauchery, brought an action to recover the half of the 50*l.* bank note, and declared upon a bailment of half of a 50*l.* Bank of England note to be redelivered upon request, alleging a refusal to redeliver such half-note, and, secondly, in detinue for the same half-note. The defendant pleaded a pledge to secure money lent which was still due. The plaintiff replied setting up that the money was lent for the purpose of being expended in the brothel in debauchery and immoral conduct. Judgment was given for the defendant on the ground that the plaintiff could not recover without shewing the true character of the deposit, and, that being upon an illegal consideration to which he himself was a party, he was precluded from obtaining the assistance of the law to recover it back. In the case of *Taylor* v. *Chester* (1) the plaintiff was seeking to recover by the count in detinue his property, and failed because he could only defeat the defendant's plea through the medium and by the aid of an illegal transaction to which he was himself a party, and which was the basis of the replication set up in answer to the plea. In the case now before the Court, whether or not it was impossible for the plaintiff in the present case to recover the 107*l.* 6*s.* 8*d.* without disclosing that it was received by him in the shape of payments or deposits received in the street when he was occupied in the street in street betting contrary to 6 Edw. 7, c. 43, it is plain that the plaintiff himself brought this fact to the notice of the Court in the statement of his case as plaintiff in the action. This case of *Taylor* v. *Chester* (1) seems to affirm the proposition that, even in a case where the plaintiff is seeking to

(1) (1869) L. R. 4 Q. B. 309.

recover property, he may be defeated if to a plea setting up a right to detain the property as security for money lent the plaintiff has to rely by way of replication upon the immoral consideration for the contract.

There are several cases reported in which the action was for recovery of property, in which the Court, although it allowed the plaintiff to recover, yet indirectly affirms the proposition that even an action for right of property may be defeated on the ground ex turpi causa non oritur actio. Thus in *Feret* v. *Hill* (1), which was an action of ejectment, the Court allowed the plaintiff to recover notwithstanding the fact that the plaintiff used the premises for immoral purposes and intended to do so at the time he became tenant of the premises; but the decision of the Court was based upon the proposition that the estate having passed by the lease could not be divested by a collateral fraud or by the immoral intention of the plaintiff at the time he became lessee, or by immoral use made by him of the premises after he got possession. In *Feret* v. *Hill* (1) the defendant was quite innocent of the intended user by the lessee. The Court treated the intention of the lessee as a collateral matter. I agree that in a sense the Court refused to defeat the plaintiff's right of action on the ground that the plaintiff was not seeking to enforce a contract, but to enforce a right of property, but it is plain from an observation of Jervis C.J. (2)—"The difficulty is that the agreement was not void at the time of its execution"—that the Court would have applied the doctrine if it had not held that the matter relied on to prevent the plaintiff recovering was collateral only and did not affect his right of possession or the validity of the conveyance, whereas in the present case the receipt of the money by the plaintiff was illegal at the moment of receipt; and according to the dictum of Mellish L.J. in *Taylor* v. *Bowers* (3), "If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out," and, if this is so, it would seem that the men who paid the sums could have

(1) (1854) 15 C. B. 207. (2) 15 C. B. 213.
(3) (1876) 1 Q. B. D. 291, at p. 300.

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recovered the money if they had chosen to abandon the bet before the race was run, but this dictum has been doubted by Fry L.J. in *Kearley* v. *Thomson*. (1) The dictum of Mellish L.J. was that "if money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out, but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action; the law will not allow that to be done." And the comment of Fry L.J. is: "Notwithstanding the very high authority of the learned judge who expressed the law in the terms which I have read, I cannot help saying for myself that I think the extent of the application of that principle, and even the principle itself, may, at some time hereafter, require consideration, if not in this Court, yet in a higher tribunal; and I am glad to find that in expressing that view I have the entire concurrence of the Lord Chief Justice." I only cite that case for the purpose of shewing the nature of the property which the plaintiff had in this money. Taking all the authorities, which I do not think it necessary to quote at length, into consideration, I am of opinion that it is clear that the principle that the Court will not assist a plaintiff to recover money which has been obtained in an illegal transaction applies to actions for the recovery of property as well as actions on contracts tainted with illegality. And I am also of opinion that this principle would be applied in cases where the defendant is not a party to the original illegality.

An action to recover property will not in my opinion be defeated by the application of the principle embodied in the maxim "Ex turpi causa non oritur actio," unless it is an action to recover some specific thing such as could be recovered in an action of trover or detinue. The thing the subject of the action must have been directly acquired through the medium of a transaction which was fraudulent or illegal. It is not sufficient to induce the Court to refuse its assistance to a plaintiff that he has acquired the property under a contract which is void in law. The property must have been acquired in an illegal transaction.

(1) (1890) 24 Q. B. D. 742, at p. 746

The fact that the property was acquired by a contract void in law may, as between parties to the transaction under which the property is alleged to have passed to the plaintiff, afford a good defence, but it will not be a ground upon which the Court will refuse its assistance. Prima facie it does not seem just that the defendant, the Chief Commissioner of Police, who is a stranger to the transaction and has given no consideration, should, as a result of the Court's refusal to assist the plaintiff, retain this money for the police fund. The effect is that the money is forfeited because the plaintiff received it in the course of a transaction made illegal by the Street Betting Act, 1906, which Act, while it makes several things liable to forfeiture, does not make money seized by the police when arresting persons engaged in street betting liable to forfeiture as is done in the Betting Act of 1853; but the answer seems to be that the question in this case is not whether this person or that person is entitled to the money in question in this action, but whether the plaintiff has by acquiring possession of these specific coins in an illegal transaction lost the right to ask for the assistance of the Court. I do not think he can do this even as trustee for the various depositors. The money so long as it was in the plaintiff's hands never ceased to be deposited as security in a transaction made illegal by the Street Betting Act. The ground, if any, upon which the action of the plaintiff must fail is not a mere matter of defence; it is a ground which, whether set up by way of defence or not, the Court will act upon. The ground is that the plaintiff has himself, in the course of his case, brought to the notice of the Court the fact that the money which he is seeking to recover in this action of detinue was money deposited with him in the course of an illegal transaction of street betting prohibited by the Act for the suppression of betting in streets and other public places, 6 Edw. 7, c. 43. If it had been proved that this money had been deposited to secure to the plaintiff the due payment of a bet on a horse race, and that the money in question remained money tainted with illegality by reason of the purpose of the deposit, I cannot see why the rule "Ex turpi causa non oritur actio" should not be applied by the Court when invited to assist a plaintiff in such a transaction. It is said that this would involve the Court in

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enabling a thief or fraudulent bailee of money or property so deposited to get the benefit of his theft or fraud with impunity, and would do so in the case of every detention where such money or property had been stolen, and whether the person detaining was the Chief Commissioner of Police or anybody else. I agree that this is not a possible state of the law; but may it not be that the Court would not feel bound to refuse to assist in such a case the plaintiff in an action of detinue, or for money had and received, because the plaintiff and defendant were not in pari delicto and because in such case the Court would be violating its own principle of not giving the assistance of the Court to assist a litigant in a case in which the defendant brought the fact to the notice of the Court that he avowedly was either relying on theft or fraud, or detaining that which he informed the Court he had no title to detain?

I do not propose in this case to determine these questions which would arise, because it has been suggested to me that in this case there is no evidence and nothing in the plaintiff's case as stated before Warrington J. to shew under what circumstances or for what purpose the plaintiff received the 107*l.* 6*s.* 8*d.* There is nothing to prove that it was a deposit and nothing to prove the condition of the deposit, if there was one. The money may have been received in payment of some previous transaction, betting or otherwise—some completed transaction. So I think the judgment of Warrington J. cannot stand, but I have thought it right to make the observations I have made on this appeal because I have been allowed to read the judgment of Moulton L.J., and feel it right to say that I cannot agree with his views on the application of the doctrine "Ex turpi causa non oritur actio." The case of *Tenant* v. *Elliott* (1) and the case of *Farmer* v. *Russell* (2) throw a great deal of light on the principles upon which the doctrine ex turpi causa is applied, especially the latter case, but do not in my view militate against the views which I have expressed as to the application of this doctrine. The result will be one in which we all concur—that this appeal should be allowed, and, of course, with the usual consequences, with costs.

(1) (1797) 1 Bos. & P. 3. (2) 1 Bos. & P. 296.

FLETCHER MOULTON L.J. read the following judgment:—The facts of this case are clearly and sufficiently set out in the judgment of the learned judge in the Court below (1), and therefore I shall not recapitulate them here, but proceed to draw from them the legal conclusions to which in my opinion they lead..

The warrant under which the police acted was issued under the provisions of s. 11 of the Betting Act, 1853. This Act authorizes the police, in executing a warrant under it, to seize documents relating to racing or betting found in a house suspected to be kept or used as a betting house contrary to the Act. But it does not authorize them to detain moneys found therein, so that the fact that they were executing such warrant furnishes no justification for their seizing or detaining the money in question in this case. It was faintly suggested by counsel on behalf of the respondent that the police might have proceeded under s. 48 of the Metropolitan Police Act, 1839, in which case it is arguable that these moneys might lawfully have been seized and in certain events confiscated, but it is enough to say that they did not in fact proceed under such last-mentioned statute, or comply with the conditions precedent to the issue of a warrant thereunder. It is, therefore, not necessary to consider what would have been their powers in such a case, but I must not be understood to accept the suggestion made by the respondent's counsel that, even if they had been acting under a warrant so issued, the respondent would have been entitled to retain the money found in the house belonging to a person against whom they failed to obtain a conviction, and who (as the plaintiff in this case) was found by the jury not to be concerned with the keeping of the house as a gaming house or with the betting going on therein. It follows that we may at once put away from our minds all questions depending on the fact that it was the police that took possession of the money, and kept it. They possessed no further or other right to take the money and keep it than would have been possessed by any member of the public, since their special powers in such a case depend solely upon the authority given to them by the warrant which they are executing.

(1) The facts as stated by the learned judge were substantially the same as stated at the commencement of this report.

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It appears that at the trial one of the witnesses suggested that the seizure and detention of the money was necessary for the purposes of the trial. To my mind there is not the faintest justification for such a suggestion. The production of actual coins found in the house as evidence at the trial could render no assistance to the Court which counting the money and deposing to the amount would not equally render. Nothing could depend on the production at the trial of the actual coins by which the sum was made up. But in justice to the Chief Commissioner of Police I must add that, so far as I remember, reliance was not put upon this point by his counsel in the argument before us. If the money was actually seized and retained for the purposes of the trial, it was with regard to the charge there made against the plaintiff, who was found by the jury not guilty, and in such circumstances the first principles not only of common honesty, but also of common decency, would require an immediate return to him of that which had been thus mistakenly seized and detained from him, and I should have been both surprised and ashamed at a public official in such a position as the Chief Commissioner of Police attempting to base his title to retain the money on any seizure which the result of the trial failed to justify. We may therefore dismiss from our minds the fact that the defendant is an official of the police. His powers as such do not lend any justification to the retention of the money. The defence on which he relies would be equally good on behalf of any person who on going into the room and seeing the money had pocketed it, and defied the plaintiff to recover it from him. This defence does not rest upon any title or show of title in the defendant, but on an alleged impotence on the part of the plaintiff to recover the money from any one who has got hold of it. The defendant does not pretend that he has any right to the money, nor does he in truth deny that it belongs to the plaintiff; but he keeps it because he asserts that he may safely do so inasmuch as the Courts of the land will refuse to assist the true owner to recover it by reason of the maxim "Ex turpi causa non oritur actio," the money being, in fact, the proceeds of bets made by him under circumstances

which constituted him an offender under the Street Betting Act, 1906.

In order to do justice to this defence one must examine the provisions of this Act. The operative section renders a person frequenting or loitering in streets or public places for the purpose of betting liable to penalties (and in the case of aggravated or repeated offences to possible imprisonment), and in addition it makes him liable to forfeit all books, cards, papers, and other articles relating to betting which may be found in his possession. It is evident, therefore, that the Act does not forfeit the money found on the offender, nor is it suggested by the respondent that it does. No doubt, in respect of the money taken by him in respect of bets, he is (as in the case of other moneys paid in respect of wagering transactions) liable to claims under the provisions of the various Gaming Acts. For instance, it may be that the person making the bet with him and paying the deposit may, if he change his mind, and desire to cancel the bet, sue for and recover the deposit as his money. But he would sue in debt and not in detinue. He would have no title to recover the actual coins handed by him to the other party for the purpose of the deposit, nor would the liability of the latter be any other or different liability than the ordinary liability of a debtor, namely, to repay the amount of the debt. These considerations shew what I should have thought to have been so clear as not to require argument, namely, that the property in the specific coins paid in respect of the bet passed to the person receiving them just as absolutely as in the case of any other payment. There being no forfeiture of the money under the Street Betting Act, 1906, and the property in the coins having passed out of the payer by his own voluntary act of payment, that property must be in the receiver, and whatever punishments and liabilities he may incur through his wrongful action in frequenting the streets for the purpose of betting, there is nothing that affects his property in the money received by him. It stands exactly in the same position as any other money that belongs to him, and his paying it into his account at his bank or his changing it for other moneys of an equal amount would be absolutely without effect on his legal position with regard to it.

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This being so, I utterly fail to see how the maxim "Ex turpi causa non oritur actio" can have any applicability to this case. Here the plaintiff became possessed of the money under circumstances which did not prevent the property passing to him with the possession. He is, therefore, simply in the position of a man suing for money belonging to him which has been taken and is being retained by a person who has no right to it. There is no turpis causa in the matter. The money is admittedly money of the plaintiff, and his action to obtain the repayment of it from the defendant rests on nothing but that fact. He is not asking the Court to enforce any illegal contract or to grant relief dependent in any way on any illegal transaction on his part, but solely on the unjustifiable detention by the defendant of his money. Could it be pretended that a banker could with impunity appropriate moneys paid in by a customer on the ground that they had been obtained by transactions rendering the customer liable to a penalty, as, for instance, by the sale of goods which did not comply with the requirements of the Merchandise Marks Act, or that in similar circumstances the cashier to whom the money is given to take to the bank could refuse to pay it in and appropriate it to his own use? Yet such cases as these would be stronger cases in favour of the application of the principle than is the present case, for the penalty is attached by the Merchandise Marks Act to the operation of sale, whereas under the Street Betting Act, 1906, the penalty is directed against frequenting and loitering for the purpose of betting, and not against the bets themselves. A bet made in the street is not illegal, and as such has just as much and just as little validity as a transaction as any other bet. The fact that actual bets have been made by a person prosecuted under the Street Betting Act, 1906, is only relevant as evidence of the purpose for which he was frequenting the street, and the bets do not constitute the offence itself.

The law does not avail itself of such lawless methods as the defendant suggests in order to enforce respect for the law. If it intends moneys to be forfeited which are acquired by acts which are prohibited by statute, it provides that they shall be so forfeited and to whom they shall go. But I know of no

principle of law, or decision, or even dictum, which renders money which has become the property of an individual liable to be taken and kept with impunity by any person who chances to get hold of it, merely because it has been acquired by some wrongful or prohibited act, in which position the judgment appealed from would leave the plaintiff's money in the present case.

On broad grounds of principle, therefore, I am of opinion that this appeal must be allowed. But it may be worth pointing out that to uphold the judgment would be to say that although under the Street Betting Act, 1906, the money found on a person contravening the Act is not liable to be forfeited, the constable making the arrest (or, indeed, any member of the public present at the time) may pocket and keep for his own private use any money so found. For there is no reason why the policeman should pay it to the Commissioner of Police. He has the rights of an ordinary member of the public, which, according to the judgment of the learned judge, give immunity to the taking and keeping possession of such moneys by reason of the refusal of the law to interfere in respect of them; and seeing that his alleged right to retain the money is not based upon his position as a member of the police force, but on grounds common to all members of the public, the judgment of the learned judge would fully authorize his retaining it for his private use. The refusal to enforce the rights of the plaintiff is either a duty of the Court or the reverse. It cannot be capriciously exercised or not as the Court may desire so as to make it possible to draw a distinction between the retention of the moneys by the constable himself or by his superior.

BUCKLEY L.J. read the following judgment:—So far as I can properly do so, I express my regret that I find myself unable to affirm the decision of Warrington J. It might be a wholesome state of the law that money obtained in betting transactions might under circumstances such as those in the present case be seized and confiscated by the police. But that is not the law. Nor since 1853 can it be successfully argued, as Mr. Bankes has argued, that that is the policy of the law. Sect. 12 of the Betting Act, 1853 (16 & 17 Vict. c. 119), did not repeat the provision of s. 48 of the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47),

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which empowered the police in certain circumstances to seize moneys and securities for money. The Act of 1853 authorizes the seizure only of lists, cards, or documents relating to racing or betting found in the house. It is certainly the law that the Court will refuse to enforce an illegal contract or obligations arising out of an illegal contract, and I agree that the doctrine is not confined to the case of contract. A plaintiff who cannot establish his cause of action without relying upon an illegal transaction must fail: and none the less is this true if the defendant does not rely upon the illegality. If the Court learns of the illegality, it will refuse to lend its aid. The rule is founded not upon any ground that either party can take advantage of the illegality, as, for instance, the defendant by setting it up as a defence. It is founded on public policy. Lord Mansfield in *Holman* v. *Johnson* (1) said "Ex dolo malo non oritur actio. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act." But what is the cause of action in the present case? The plaintiff had the property and the possession. His cause of action is exhaustively stated by saying that he sues the defendant for having deprived him of the possession of his property. The defendant seeks to say, "True, it is your property, but it ought not to have been your property; you ought not to have got it by or in betting transactions." That is a matter which forms no part of the cause of action. If the property is taken from the plaintiff on that ground, it is taken by confiscation. There is no ground of public policy upon which the defendant should keep that which under no circumstances is his. It may be that the plaintiff never ought to have acquired that property, but, having acquired it, his cause of action to recover it from the person who deprives him of it arises only from the fact of deprivation. The passage upon which Warrington J. relied in the judgment of Lindley L.J. in *Scott* v. *Brown, Doering, McNab & Co.* (2) does not support the proposition for which the learned judge seeks to use it. The plaintiffs there were basing their action upon a contract which was illegal, and the passage in question is but an elaboration of the maxim "Ex turpi causa non oritur actio." Mr. Bankes relied upon the words of Fry L.J. in *Cleaver* v. *Mutual*

(1) 1 Cowp. 341, at p. 343. (2) [1892] 2 Q. B. 724, at p. 728.

Reserve Fund Life Association (1), "No system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person." Those words bear no relation to the facts of the present case. The plaintiff here is not enforcing any rights directly resulting to him from his carrying on business as a bookmaker; he is not recovering bets; he is seeking to recover from the defendant, who has seized it, money which was his and none the less his because it became his by virtue of a gambling transaction.

Taylor v. *Chester* (2) seems to me to be no authority against the plaintiff in the present action. The plaintiff there sued for the detinue of his property, namely, the half of a 50*l.* note. The defendant said, "True, it is yours, but I am entitled to it as mortgagee." The plaintiff replied, "True, you are mortgagee, but the mortgage debt is no debt because it was incurred for immoral purposes." The plaintiff, therefore, could not recover without setting up the illegality of the transaction, and in pari delicto melior est conditio possidentis. *Feret* v. *Hill* (3) is much nearer to the present case. The plaintiff there acquired the premises and used the premises for immoral purposes, but he succeeded in ejectment in maintaining his title to the premises because the property was in him, inasmuch as the estate had passed by the lease. The purposes for which he had acquired the property were not a matter which he had to prove to establish his cause of action. In the present case the Court no doubt learned how the plaintiff obtained the property and possession of the money. But, inasmuch as he had in fact both the property and the possession, the way in which he obtained them formed no part of his cause of action.

I think the order below must be discharged and judgment given for the plaintiff with costs.

Appeal allowed.

Solicitors for plaintiff: *Good, Good & Co.*

Solicitors for defendant: *Wontner & Sons.*

(1) [1892] 1 Q. B. 147, at p. 156. (2) L. R. 4 Q. B. 309.
(3) 15 C. B. 207.

E. L.

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An arbitrator has a discretion as a judicial officer to allow an amendment of pleadings delivered by the parties in compliance with a direction given to them by him. *In re* CRIGHTON AND THE LAW CAR AND GENERAL INSURANCE CORPORATION, LIMITED - - **Div. Ct. 738**

2. —— *Practice — Jurisdiction — Service of Notice of Motion to set aside Award on Foreign Company out of Jurisdiction — Rules of the Supreme Court*, 1883, *Order* XI., *r.* 8A.
There is no jurisdiction under Order XI., r. 8A, of the Rules of the Supreme Court, 1883, to grant leave for service out of the jurisdiction of a summons, order, or notice, except in the circumstances in which there is jurisdiction under Order XI., r. 1, to grant leave for service of a writ of summons out of the jurisdiction.
If leave is granted for service in a country to

ARBITRATION—*continued.*

which Order XI., r. 8, applies, the summons, order, or notice must be served in the manner directed by that rule; if in a country to which r. 8 does not apply, the service must take place in the manner directed by the previous rules having reference to the service of notice of a writ of summons.

An award was made against the respondents, a foreign company carrying on business in Sweden, in an arbitration held in England in pursuance of a clause contained in an agreement entered into in France between the respondents and the applicants, a foreign company carrying on business in France. The clause in the agreement under which the arbitration took place provided that in the event of any dispute arising under the agreement the same should be submitted to arbitrators to be appointed by each party, or in case of need to an umpire to be appointed by the arbitrators. The applicants and respondents respectively appointed a Frenchman and an Englishman as arbitrators, and the arbitrators appointed an Englishman as umpire, by whom the award was made in England. Under the agreement the respondents "elected" a French domicil:—

Held, that there was no jurisdiction under Order XI., r. 8A, to grant leave to the respondents for service on the applicants out of the jurisdiction of a notice of motion to set aside the award. *In re* AKTIEBOLAGET ROBERTSFORS AND LA SOCIÉTÉ ANONYME DES PAPETERIES DE L'AA - - - - - - **Div. Ct. 727**

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ASSIGNMENT—*Judgment Debt—Assignment of Part—Rights of Assignee—Leave to issue Execution—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.

A judgment creditor having assigned part of the judgment debt for valuable consideration, the assignee applied under Order XLII., r. 23, for leave to issue execution:—

Held by Bray J. and by the Court of Appeal, that the assignee was not entitled to such leave.

By Bray J. on the ground that there cannot be an absolute assignment within s. 25, sub-s. 6, of the Judicature Act, 1873, of a definite part of an existing debt or other legal chose in action.

By the Court of Appeal on the ground that, as the original judgment creditor could only issue a single execution upon his judgment, and could not split up the judgment debt and issue separate executions upon the different parts, he could not

ASSIGNMENT—*continued.*

give to an assignee of a part of the judgment debt a right which he did not himself possess. FORSTER *v.* BAKER - - - - **C. A. 636**

2. —— *Part of Debt—Right of Assignee to sue—Supreme Court of Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.

Under s. 25, sub-s. 6, of the Supreme Court of Judicature Act, 1873, an ascertained part of a debt can be assigned, and the assignee can sue in his own name to recover from the debtor the part of the debt assigned.

By a deed of assignment so much of a debt of 125*l.* due to the assignor not exceeding 30*l.* as should cover the costs due from the assignor to the plaintiffs (a firm of solicitors) was assigned to the plaintiffs:—

Held, that the assignment was valid under s. 25, sub-s. 6, of the Judicature Act, 1873, and that the plaintiffs could sue the debtor in their own name to recover from him the portion of the debt assigned to them. SKIPPER & TUCKER *v.* HOLLOWAY AND HOWARD - **Darling J. 630**

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BANKRUPTCY—*Costs — Taxation — Trustee's Solicitor's Bill of Costs—Notice of Taxation not given to New Trustee—Retaxation after Allocatur signed—Practice—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 73, *sub-s.* 3—*Bankruptcy Rules*, 1886 *and* 1890, *rr.* 120, 122.

Rule 120 of the Bankruptcy Rules, 1886 and 1890, provides that every person whose bill or charges is or are to be taxed shall in all cases give not less than seven days' notice of the appointment to tax the same to the official receiver and to the trustee (if any).

A trustee in bankruptcy passed his solicitor's bill of costs subject to taxation, and the solicitor lodged the bill with the taxing officer and obtained an appointment to tax. Before the date fixed for the taxation arrived a new trustee in bankruptcy was appointed, but the

BANKRUPTCY—*continued.*

solicitor did not give notice of the appointment to tax either to the official receiver or to the new trustee, and the taxing officer gave his allocatur for the amount of the taxed bill:—

Held, on the construction of the rule, that "the trustee" who ought to have had notice of the appointment to tax was the person who was trustee at the time when the taxation took place, i.e., the new trustee, and that notice should also have been given to the official receiver. A retaxation of the solicitor's bill was accordingly directed with liberty to the new trustee to attend, and in the meantime the allocatur was suspended. *In re* SMITH. *Ex parte* WILSON - - - **Phillimore J. 346**

2. —— *Discovery — Interrogatories — Bankruptcy Rules*, 1886–1890, *r.* 72.

The petitioning creditor in a bankruptcy petition cannot, before the hearing of the petition, obtain an order for interrogatories or discovery to prove the allegations in the petition. *In re* A DEBTOR (No. 7 of 1910) **C. A. 59**

3. —— *Marriage Settlement—Covenant by Husband to settle after-acquired Furniture—Furniture afterwards bought and used at Family Residence—Bankruptcy of Husband—Title of Trustee in Bankruptcy—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 47, *sub-s.* 2.

The debtor by his marriage settlement settled the furniture in his private residence upon trust in the first instance for the use and enjoyment of his wife during her life and covenanted that any furniture afterwards acquired by him during the life of his wife should form part of the settlement. The debtor and his wife, after many changes of residence, ultimately moved into a large house, where they lived together until the debtor's bankruptcy, and the debtor purchased a large amount of additional furniture for this house. There was no formal delivery of the additional furniture to the trustee of the settlement, but he occasionally visited the debtor and his wife and saw the furniture. After a receiving order had been made against the debtor he removed all the furniture at the family residence to a warehouse. The trustee in the bankruptcy claimed the after-acquired furniture on the ground that it had not been "actually transferred" to the trustee of the settlement pursuant to the covenant as required by s. 47, sub-s. 2, of the Bankruptcy Act, 1883:—

Held that, in view of the fact that the furniture had been used by the wife in accordance with the trusts of the settlement, no formal transfer to the trustee of the settlement was necessary, but that in the eye of the law there had been an actual transfer made in pursuance of the covenant by the debtor to the trustee of the settlement and by the trustee of the settlement back to the wife, and that the claim of the trustee in the bankruptcy failed.

Dictum of Wright J. as to "actually transferred" in *In re Reis*, [1904] 1 K. B. 451, at p. 456, overruled. *In re* MAGNUS. *Ex parte* SALAMAN - - - - - **C. A. 1049**

BANKRUPTCY—*continued.*

4. —— *Petitioning Creditor's Debt—Judgment—Action by Bankrupt to set aside Judgment on Ground of Fraud—Jurisdiction.*

Where a person who has been adjudicated a bankrupt in consequence of his failure to comply with a bankruptcy notice to pay a judgment debt alleges that the petitioning creditor's judgment was obtained by fraud, he may apply to the Court in bankruptcy to be allowed to contest the validity of the judgment. He cannot, however, while the adjudication remains in force, bring an action to set aside the judgment on the ground that it was obtained by fraud, and the High Court has no jurisdiction to entertain such an action. BOALER *v.* POWER - **C. A. 229**

5. —— *Trustee—Fidelity Bond—Surety—Default of Trustee—Penal Interest—Liability of Surety—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 74, *sub-s.* 6.

A trustee in bankruptcy and his surety entered into a bond with the Board of Trade in the sum of 500*l.* (afterwards reduced to 100*l.*) for the due performance by the trustee of his duties as trustee, subject to a condition avoiding the bond if the trustee should "well and sufficiently perform and execute all and singular the duties required of him as trustee by the Bankruptcy Acts, 1883 and 1890," or if he should fail therein and the surety should "make good any loss or damage occasioned by any such default to the estate of the said bankrupt." The trustee improperly retained for some years a sum of money exceeding 50*l.*, and, on his default being discovered, he was removed from his office, and, pursuant to s. 74, sub-s. 6, of the Bankruptcy Act, 1883, he was surcharged with interest at the rate of 20 per cent. per annum on the sum he had improperly retained. The trustee made good the sum he had improperly retained, but did not pay the interest with which he had been surcharged:—

Held, that the interest surcharged was in the nature of a penalty and was not a measure of the loss or damage to the estate occasioned by the default of the trustee, and that the surety was not liable under the terms of the bond to pay to the Board of Trade the penal interest or any part of it.

Decision of Phillimore J., [1910] 1 K. B. 401, reversed. BOARD OF TRADE *v.* EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED **C. A. 649**

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BETTING—*Illegality—Gaming—Street Betting—House used for Betting—Seizure in House by Police of Proceeds of Street Betting — Action to recover Money — Street Betting Act*, 1906 (6 *Edw.* 7, *c.* 43)—*Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *ss.* 11, 12—*Metropolitan Police Act*, 1839 (2 & 3 *Vict. c.* 47), *s.* 48.

The plaintiff deposited in a house, which was

BETTING—*continued.*

occupied by a person employed by him, money, which was the proceeds of street betting operations carried on by him. In pursuance of a warrant issued under the Betting Act, 1853, s. 11, the police entered the house, and seized therein a number of betting slips and the aforesaid money. The plaintiff and his above-mentioned employee were subsequently prosecuted for using the house as a gaming house. The plaintiff's employee was convicted, but the plaintiff was acquitted of the charge. The Chief Commissioner of the Metropolitan Police having refused to give up the aforesaid money, the plaintiff brought an action against him to recover the same. At the trial, the defence having been set up by the defendant that the money belonged not to the plaintiff, but to his above-mentioned employee, the plaintiff, who was called as a witness, in rebutting that defence disclosed the fact that he had obtained the money by street betting. The learned judge at the trial found that the detention of the money was in the first instance lawful as being requisite for the purposes of the prosecution; and he held that the maxim "Ex turpi causa non oritur actio" applied, and that the plaintiff could not therefore recover :—

Held, reversing the decision of the learned judge, that, the plaintiff's cause of action not being shewn to arise out of any illegal transaction, he was entitled to recover. GORDON *v.* CHIEF COMMISSIONER OF METROPOLITAN POLICE - - - - - - - **C. A. 1080**

BETTING CIRCULAR — *Infant — Circular sent to Undergraduate — Presumption of Knowledge of Infancy—"Any person at any university"—Betting and Loans (Infants) Act*, 1892 (55 & 56 *Vict. c.* 4), *s.* 3.

A circular sent to a person at an address in a university town is not sent to a person "at a university" within the meaning of s. 3 of the Betting and Loans (Infants) Act, 1892, unless the sender knows that the address is that of a house at which undergraduates are permitted by the university authorities to reside.

So *held* by Channell and Bray JJ., Lord Alverstone C.J. dissenting. MILTON *v.* STUDD **Div. Ct. 118**

BILL OF LADING — Debenture-holders — Receiver and manager, Powers of—Shipment of goods by receiver—Lien for previously unsatisfied freight - **813**
See COMPANY. 2.

BILL OF SALE — *Payment by Instalments — Equal Monthly Payments in respect of both Principal and Interest—Construction of Statutory Form—Bills of Sale Act*, 1878, *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9.

By a bill of sale goods were assigned to the grantee to secure an advance of 30*l.* made by him to the grantor, with interest thereon at the rate of 10*d.* in the 1*l.* per month, and the grantor further agreed and declared that he would pay to the grantee the principal sum aforesaid, together with the interest then due, by monthly payments of 2*l.* on the 9th day of

BILL OF SALE—*continued.*

every month succeeding the date of the bill of sale, the first payment to be made on the 9th day of November then next, and that, in default of payment of any instalment of the said principal sum, he would pay interest on such instalment at the rate aforesaid from the date when the same should become due until payment thereof. The real bargain between the parties was that the payment of both the principal and the interest should be made by monthly payments of 2*l.* :—

Held by Vaughan Williams L.J. and Buckley L.J., Fletcher Moulton L.J. dissenting, that, upon the true construction of the bill of sale, it expressed the real bargain between the parties, and that it was not void as not being in accordance with the form in the schedule to the Bills of Sale Act, 1878, Amendment Act, 1882.

Goldstrom v. *Tallerman*, (1886) 18 Q. B. D. 1, discussed. ROSEFIELD *v.* PROVINCIAL UNION BANK - - - - - - - **C. A. 731**

BIRDS—Wild birds.
See under WILD BIRDS.

BLIND AND DEAF CHILDREN—Child boarded out and educated by education authority—Child without means of support—Recovery of expenses from "parent"—Liability of guardians of union - **559**
See SCHOOLS. 1.

BOARD OF EDUCATION.
See under SCHOOLS.

BOND — Fidelity bond — Surety — Default of trustee — Penal interest — Liability of surety - - - - - - **649**
See BANKRUPTCY. 5.

BORROWING POWERS — Municipal corporation — Obligation on corporation to mortgage rates by way of security for loan - - - - - - - **201**
See CORPORATION.

BREACH OF CONTRACT.
See under CONTRACT.

CAB — Workmen's compensation — Taxi-cab driver — "Workman" — "Contract of service" - - - - - - **336**
See EMPLOYER AND WORKMAN. 10.

CANCELLATION — Ship — Non-arrival by fixed date—Date for exercise of option to cancel charterparty - - - **844**
See SHIPPING. 2.

CARRIAGE OF GOODS—By lighter from ship to warehouse — Limits of liability of wharfinger - - - - - **395**
See WHARFINGER.

CARRIER—*Dangerous Goods—Common Carrier—Absence of Notice of Danger to Carrier—Implied Warranty by Consignor that Goods are not Dangerous—Duty of Consignor to inform Carrier of Nature of Goods.*

The defendants delivered to the plaintiff's

CARRIER—*continued.*

husband, who was the owner of a keel, for carriage thereon, by him, as a common carrier, a quantity of a chemical called ferro-silicon, packed in casks. Ferro-silicon is sometimes under certain conditions a dangerous substance from its liability to give off very poisonous gases. The ferro-silicon was delivered by the defendants to the plaintiff's husband as before mentioned under the description of "general cargo," and he was not informed by them and did not know that it was ferro-silicon. In consequence of the ferro-silicon so shipped on the plaintiff's husband's keel giving off poisonous gases, the plaintiff's husband died, and the plaintiff, who was on board the keel with him assisting in its management, was rendered seriously ill. At the trial of an action brought by the plaintiff in her own right, and also as administratrix of her husband, to recover damages in respect of her illness and of pecuniary loss occasioned by her husband's death, it appeared that the defendants knew, when they shipped the casks, that they contained ferro-silicon, but it was found by Walton J., who tried the case without a jury, that they did not know, and he did not find that negligence could be imputed to them in respect of not knowing, that ferro-silicon was dangerous :—

Held, affirming the judgment of the learned judge, that the action was nevertheless maintainable.

By Vaughan Williams L.J.: It was, on the shipment of such an article as ferro-silicon, the duty of the defendants to communicate to the plaintiff's husband such information as they had as to the nature of the article which they were shipping on his keel, and, therefore, to describe it, not as general cargo, but by the name of ferro-silicon, and by reason of neglect of that duty they were liable.

By Fletcher Moulton L.J. and Farwell L.J. : Where a consignor who delivers goods to a common carrier, for carriage by him in performance of his common law obligation to carry, does not give notice to the carrier that the goods are dangerous, he must, unless the carrier knows, or ought to know, the dangerous character of the goods, be taken impliedly to warrant that the goods are fit for carriage in the ordinary way, and not dangerous.

Brass v. *Maitland*, (1856) 6 E. & B. 470, and *Acatos* v. *Burns*, (1878) 3 Ex. D. 282, discussed. BAMFIELD *v.* GOOLE AND SHEFFIELD TRANSPORT COMPANY - - - - - **C. A. 94**

CASES :—

—— *Acatos* v. *Burns* - (1878) 3 Ex. D. 282
Discussed by C. A. BAMFIELD *v.* GOOLE AND SHEFFIELD TRANSPORT COMPANY - - [1910] **2 K. B. 94**

—— *Allan* v. *Thomas Spowart & Co.*, (1906) 43 Sc. L. R. 599.
Approved by C. A. BAKER *v.* JEWELL [1910] **2 K. B. 673**

—— *Bennett* v. *White* - [1910] 2 K. B. 1
Reversed by C. A. [1910] **2 K. B. 643**

CASES—*continued.*

—— *Board of Trade* v. *Employers' Liability Assurance Corporation, Ld.*, [1910] 1 K. B. 401.
Reversed by C. A. - [1910] **2 K. B. 649**

—— *Brass* v. *Maitland* - (1856) 6 E. & B. 470
Discussed by C. A. BAMFIELD *v.* GOOLE AND SHEFFIELD TRANSPORT COMPANY - - [1910] **2 K. B. 94**

—— *Brintons, Ld.* v. *Turvey* [1905] A. C. 230
Explained by C. A. EKE *v.* HARTDYKE - - - [1910] **2 K. B. 677**

—— *Broderick* v. *London County Council*, [1908] 2 K. B. 807.
Explained by C. A. EKE *v.* HARTDYKE - - - [1910] **2 K. B. 677**

—— *Bullock* v. *London General Omnibus Co.*, [1907] 1 K. B. 264.
Followed by C. A. COMPANIA SANSINENA DE CARNES CONGELADAS *v.* HOULDER BROTHERS & CO. [1910] **2 K. B. 354**

—— *Challis* v. *London and South Western Ry. Co.*, [1906] 2 K. B. 154.
Applied by C. A. NISBET *v.* RAYNE & BURN - - [1910] **2 K. B. 689**

—— *Clissold* v. *Cratchley* - [1910] 1 K. B. 374
Reversed by C. A. [1910] **2 K. B. 244**

—— *Daun* v. *Simmins* - (1879) 41 L. T. 783
Distinguished by Div. Ct. KINAHAN & CO. *v.* PARRY - [1910] **2 K. B. 389**

—— *Donellan* v. *Read* (1832) 3 B. & Ad. 899
Distinguished by Div. Ct. REEVE *v.* JENNINGS - - [1910] **2 K. B. 522**

—— *Frankenburg* v. *Great Horseless Carriage Co.*, [1900] 1 Q. B. 504.
Followed by C. A. COMPANIA SANSINENA DE CARNES CONGELADAS *v.* HOULDER BROTHERS & CO. [1910] **2 K. B. 354**

—— *Goldstrom* v. *Tallerman*, (1886) 18 Q. B. D. 1
Discussed by C. A. ROSEFIELD *v.* PROVINCIAL UNION BANK [1910] **2 K. B. 781**

—— *Gray* v. *Carr* - (1871) L. R. 6 Q. B. 522
Not followed by Walton J. KISH *v.* TAYLOR - - [1910] **2 K. B. 309**

—— *Hardy's Crown Brewery, Ld., and St. Philip's Tavern, Manchester, In re*, [1910] W. N. 76.
On appeal *see* C. A.
[1910] **W. N. 103**; [1910] **2 K. B. 257**

—— *Hobbs* v. *Winchester Corporation*, [1910] 2 K. B. 46.
Reversed by C. A. - [1910] **2 K. B. 471**

—— *Howcroft* v. *Laycock*, (1898) 14 Times L. R. 460.
Overruled by C. A. WALLIS, SON & WELLS *v.* PRATT & HAYNES [1910] **2 K. B. 1003**

CASES—*continued.*

—— *Humphries* v. *Humphries*, [1910] 1 K. B. 796.
Affirmed by C. A. - [**1910**] **2 K. B. 531**

—— *John Tweddle & Co., In re*, [1910] 2 K. B. 67.
Affirmed by C. A. - [**1910**] **2 K. B. 697**

—— *Keates* v. *Lewis Merthyr Consolidated Collieries, Ld.*, [1910] 1 K. B. 386.
Affirmed by C. A. - [**1910**] **2 K. B. 445**

—— *McLean* v. *Fleming*, (1871) L. R. 2 H. L. (Sc.) 128.
Followed by Walton J. KISH *v.* TAYLOR - - [**1910**] **2 K. B. 309**

—— *Metropolitan Water Board* v. *London, Brighton and South Coast Ry. Co.*, [1910] 1 K. B. 804.
Affirmed by C. A. - [**1910**] **2 K. B. 890**

—— *Norman* v. *Ricketts*, (1886) 3 Times L. R. 182.
Followed by Div. Ct. THAIRLWALL *v.* GREAT NORTHERN RAILWAY COMPANY [**1910**] **2 K. B. 509**

—— *Pearson* v. *Dawson* (1858) E. B. & E. 448
Distinguished by Pickford J. MORDAUNT BROTHERS *v.* BRITISH OIL AND CAKE MILLS, LIMITED [**1910**] **2 K. B. 502**

—— *Peart* v. *Bushell* - - (1827) 2 Sim. 38
Not followed by Hamilton J. UNITED MINING AND FINANCE CORPORATION, LIMITED *v.* BECHER [**1910**] **2 K. B. 296**

—— *Raynes Park Golf Club, In re*, [1899] 1 Q. B. 961.
Doubted by C. A. *In re* JOHN TWEDDLE & CO. - [**1910**] **2 K. B. 697**

—— *Reis, In re* - - [1904] 1 K. B. 451
Dictum of Wright J. as to "actually transferred" at p. 456 in, overruled by C. A.
In re MAGNUS - [**1910**] **2 K. B. 1049**
Note.—*In re Reis*, [1904] 1 K. B. 451, was reversed on the facts, [1904] 2 K. B. 769; [1905] A. C. 442.

—— *Rex* v. *Board of Education*, [1910] 2 K. B. 1045.
Affirmed by C. A. - [**1910**] **2 K. B. 165**

—— *Sadler* v. *Great Western Ry. Co.*, [1896] A. C. 450.
Discussed by C. A. COMPANIA SANSINENA DE CARNES CONGELADAS *v.* HOULDER BROTHERS & CO. [**1910**] **2 K. B. 354**

—— *Saunders* v. *Pitfield* - (1888) 58 L. T. 108
Followed by Div. Ct. WATERS *v.* PHILLIPS - - [**1910**] **2 K. B. 465**

—— *Smith* v. *Neale* - (1857) 2 C. B. (N.S.) 67
Distinguished by Div. Ct. REEVE *v.* JENNINGS - [**1910**] **2 K. B. 522**

CASES—*continued.*

—— *Smurthwaite* v. *Hannay* [1894] A. C. 494
Discussed by C. A. COMPANIA SANSINENA DE CARNES CONGELADAS *v.* HOULDER BROTHERS & CO. [**1910**] **2 K. B. 354**

—— *Solicitor, In re a; Ex parte Hales*, [1907] 2 K. B. 539.
Dictum of A. T. Lawrence J. in, not followed by Hamilton J. UNITED MINING AND FINANCE CORPORATION, LIMITED *v.* BECHER [**1910**] **2 K. B. 296**

—— *Sprigg* v. *Sigeau* - - [1897] A. C. 238
Distinguished by C. A. REX *v.* EARL OF CREWE - [**1910**] **2 K. B. 576**

—— *Stoveld* v. *Hughes* - (1811) 14 East, 308
Distinguished by Pickford J. MORDAUNT BROTHERS *v.* BRITISH OIL AND CAKE MILLS, LIMITED [**1910**] **2 K. B. 502**

—— *Suffolk County Lunatic Asylum* v. *Stow Union*, (1897) 76 L. T. 494.
Dictum of Wright J. in, explained by Div. Ct. COMMITTEE OF VISITORS OF GLAMORGAN COUNTY ASYLUM *v.* CARDIFF GUARDIANS [**1910**] **2 K. B. 547**

—— *Walshaw* v. *Brighouse Corporation*, [1899] 2 Q. B. 286.
Followed by Channell J. HOBBS *v.* WINCHESTER CORPORATION [**1910**] **2 K. B. 46**

—— *Watteau* v. *Fenwick* - [1893] 1 Q. B. 346
Followed by Div. Ct. KINAHAN & CO. *v.* PARRY - - [**1910**] **2 K. B. 389**

—— *Whiteley* v. *Burns* - [1908] 1 K. B. 705
Considered by Div. Ct. MARCHANT *v.* LONDON COUNTY COUNCIL [**1910**] **2 K. B. 379**

CASHIER—Workmen's compensation—Murder—Risks incidental to the employment - - - - - - **689**
See EMPLOYER AND WORKMAN. 1.

CERTIORARI—Board of Education—Decision—Want of jurisdiction—Mandamus **165**
See SCHOOLS. 3.

CHAIRMAN—Retirement of members—Election of new members—Position of former chairman - - - - - - **930**
See LOCAL GOVERNMENT. 1.

CHARTERPARTY—Shipping.
See under SHIPPING.

CIRCULAR—Betting circular.
See under BETTING CIRCULAR.

CIVIL PROCEDURE ACT, 1833 - - **370**
See LIMITATION OF ACTION.

COAL — Workmen's compensation—Custom to receive allowance coal during incapacity - - - - - - **269**
See EMPLOYER AND WORKMAN. 2.

COMPANY — *Debenture — Floating Security — Garnishee Order.*

A debenture, constituting a floating security over the undertaking and assets of a company, does not specifically affect any particular assets until some event occurs or some act on the part of the mortgagee is done which causes the security to crystallize into a fixed security. A demand by the debenture-holder of the payment by the company of the money secured by his debenture is not such an act ; nor is a notice by him to the company's bankers claiming payment to him of the company's bank balance which has been attached by a judgment creditor of the company under a garnishee order ; for there is no equity in a debenture-holder, whose security is a floating charge, arising from his merely giving notice to seize a particular asset of the company. EVANS *v.* RIVAL GRANITE QUARRIES, LIMITED **C. A. 979**

2. —— *Debenture-holders — Receiver and Manager, Powers of—Shipment of Goods by Receiver—Bill of Lading—Lien for previously unsatisfied Freight.*

Ind, Coope & Co., Limited, a brewery company, used to ship beer in the defendants' vessels to the company's agents abroad for the sale of beer. Among those agents was a firm in Malta. The company being in difficulties, debenture-holders, whose debentures constituted a floating charge on the undertaking and assets of the company, took steps to enforce their security, and, a debenture-holders' action having been brought, the plaintiff A. W. was by an order of the Court appointed receiver and manager of the business and undertaking of the company, which was not wound up, but continued in existence. By a letter signed "Ind, Coope & Co., by A. W. receiver and manager," the plaintiff requested the defendants to carry a quantity of beer to Malta consigned to the company, c/o the firm in Malta ; and the defendants accordingly carried the beer to Malta under a bill of lading by one of the terms of which the defendants were to have a lien on the beer shipped, not only for the freight due in respect thereof, but also in respect of any previously unsatisfied freight due from the "shippers or consignees" to them. This was the form of bill of lading which had been used in the case of goods carried for the company by the defendants. The defendants refused to deliver the beer shipped as aforesaid unless certain unsatisfied freight due to them from the company previously to the plaintiff's being appointed receiver and manager was paid. No leave had been given by the Court authorizing the plaintiff to give to the defendants any security in respect of such previously unsatisfied freight :—

Held by Vaughan Williams L.J. and Buckley L.J., Fletcher Moulton L.J. dissenting, that the defendants were not entitled to a lien on the beer shipped as aforesaid for the previously unsatisfied freight, because (1.) the bill of lading had not the effect of giving the defendants such a lien, and (2.) no leave to give them such a lien had been obtained from the Court. WHINNEY *v.* MOSS STEAMSHIP COMPANY - - **C. A. 813**

COMPANY—*continued.*

3. —— *Dividend — Payment by Dividend Warrant — Lost Warrant — Action by Shareholder—Plea of Payment—Powers of Directors —Request for Payment in particular Way— Companies Clauses Consolidation Act*, 1845 (8 *&* 9 *Vict. c.* 16), *s.* 90.

The general powers conferred upon the directors of a company by s. 90 of the Companies Clauses Consolidation Act, 1845, authorize the directors to decide within reasonable limits when and how dividends duly declared by a general meeting of the shareholders shall be paid.

The directors of a company in a half-yearly report and statement of accounts recommended the payment of a certain dividend on preference and ordinary stock, and gave notice that dividends would be paid on a certain day by means of dividend warrants sent by post to the registered address of the stockholder in each case. The shareholders of the company at their half-yearly general meeting declared the amount of dividend as proposed by the directors, but passed no resolution as to how payment should be made. On the day named in the directors' report a dividend warrant was sent by post to the registered address of a stockholder. The warrant was lost in the post :—

Held, that in the circumstances there was a request by the stockholder to the company to pay the amount due to him by means of a warrant sent by post to his registered address.

Therefore in an action by the stockholder against the company to recover the amount of dividend in respect of the stock held by him :—

Held, that the above facts supported a plea of payment by the company, and that the remedy, if any, of the stockholder was to put in suit such rights as he had upon the lost warrant.

Norman v. *Ricketts*, (1886) 3 Times L. R. 182, followed. THAIRLWALL *v.* GREAT NORTHERN RAILWAY COMPANY - **Div. Ct. 509**

4. —— *Winding-up — Official Receiver and Liquidator — Report alleging Fraud—Public Examination of Person charged — Person exculpated from Charge—Costs—Proceeding—Jurisdiction to order Official Receiver to pay Costs personally—Companies (Winding-up) Act*, 1890 (53 *&* 54 *Vict. c.* 63), *s.* 8.

A company having been ordered to be wound up in a county court, the official receiver, who was the liquidator, in his further report to the Court under s. 8, sub-s. 2, of the Companies (Winding-up) Act, 1890, stated that in his opinion the facts set out therein constituted a fraud committed in the promotion or formation of the company, and also in relation to the company since its formation, and that the persons named in the schedule to the report were parties to the fraud. Among the persons so named was E., a director of the company. Upon this report the county court judge made an order under sub-s. 3 for the public examination of the persons named. After the public examination E. applied to the judge for an order exculpating him from the charge of fraud ; this application was opposed by the official receiver, but the

COMPANY—*continued.*
judge nevertheless made an order exculpating him, and directing the official receiver personally to pay to E. the costs of his examination and of the application, there being no available assets of the company :—

Held, that so far as the costs of the public examination of E. were concerned the official receiver was merely discharging a statutory duty of a judicial character, and that there was no jurisdiction to order him personally to pay these costs. The proviso in s. 8, sub-s. 7, of the Act of 1890, empowering the Court to "allow" the exculpated person such costs as the Court may think fit, only applies where there are assets of the company available for the payment of costs.

Decision of Darling and Bucknill JJ., [1910] 2 K. B. 67, affirmed.

Held, also, that as the official receiver had accepted the position of a litigant, appeared in Court, and opposed E.'s application for exculpation, he was a party to "proceedings" in the county court, so that the judge had jurisdiction in his discretion to order him to pay the costs of that motion, and on this part of the case the Court could not interfere.

In re Raynes Park Golf Club, [1899] 1 Q. B. 961, doubted. *In re* JOHN TWEDDLE & COMPANY, LIMITED - - - **C. A. 697**

—— Income tax — Single ship company—Average of three years preceding year of assessment—Trade first set up within a period of three years - - - **923**
See REVENUE. 2.

—— Practice—Service of notice of motion to set aside award on foreign company out of jurisdiction - - - - **727**
See ARBITRATION. 2.

—— Water company.
See under WATER.

—— Winding-up — Insurance — Liability of insurers—Arbitration clause in policy **666**
See EMPLOYER AND WORKMAN. 3.

COMPENSATION—Licensing Acts.
See under LICENSING ACTS.

—— Public health—Offences—Sale of unsound meat—Seizure—Prosecution—Acquittal
See LOCAL GOVERNMENT. 3. **471**

—— Tramcar, Accident to — Liability of contractor to lessee—Damages — Compensation paid to passengers — Right of lessee to recover from contractor - **965**
See TRAMWAYS.

—— Workmen's compensation.
See under EMPLOYER AND WORKMAN.

COMPROMISE—Authority of solicitor to compromise action — Apparent assent but misunderstanding in fact on part of client as to terms of compromise - **658**
See SOLICITOR. 1.

CONDITION—Sale of goods.
See under SALE OF GOODS.

CONDITIONAL OFFER—Lands Clauses Acts—Arbitration—Costs—Offer by promoters—Conditional offer - - - **252**
See LANDS CLAUSES ACTS.

CONTINGENT PROFITS — Damages — Remoteness—Breach of contract - - **486**
See DAMAGES.

CONTRACT—*Statute of Frauds*, 1677 (29 *Car.* 2, *c.* 3), *s.* 4 — *Agreement "not to be performed within the space of one year from the making thereof" — Possible Performance by one Party within the Year—Intention.*

On April 11, 1908, the defendant entered the service of the plaintiff, a dairyman, upon the terms of a verbal agreement of that date which provided that the employment of the defendant might be determined by either party giving to the other one week's notice, and that the defendant should not within thirty-six months after quitting the plaintiff's service carry on the business of a dairyman within a certain specified area. The defendant quitted the plaintiff's service on February 6, 1910, and within thirty-six months started a dairyman's business within the prohibited area. In an action by the plaintiff claiming an injunction :—

Held, that the agreement was one that was "not to be performed within the space of one year from the making thereof" within s. 4 of the Statute of Frauds, and that, the agreement not being in writing, the action was not maintainable.

Donellan v. *Read*, (1832) 3 B. & Ad. 899, and *Smith* v. *Neale*, (1857) 2 C. B. (N.S.) 67, distinguished. REEVE *v.* JENNINGS - **Div. Ct. 522**

—— Damages—Remoteness—Breach of contract—Contingent profits - - - **486**
See DAMAGES.

—— Sale of goods.
See under SALE OF GOODS.

"**CONTRACT OF SERVICE**" — Workmen's compensation — Taxi-cab driver—"Workman" - - - - - **336**
See EMPLOYER AND WORKMAN. 10.

CONTRACTOR—Tramcar, Accident to—Liability of contractor to lessee — Damages — Compensation paid to passengers — Right of lessee to recover from contractor - - - - - **965**
See TRAMWAYS.

CONVENIENCES—Water rate—Domestic purposes—Railway station—Sanitary conveniences - - - - - **890**
See RATES. 2.

CORPORATION — *Borrowing Powers — Obligation on Corporation to mortgage Rates by way of Security for Loan—Local Government—Municipal Corporation—Urban Authority — Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 233.

The borrowing powers conferred upon an urban authority by s. 233 of the Public Health

CORPORATION—*continued.*
Act, 1875, do not enable it to borrow money (for other than temporary purposes) without securing the repayment of the loan by a mortgage of the rates or fund on the credit of which the money is borrowed. Therefore a payment of interest made on behalf of the authority upon money borrowed for a permanent purpose without security is illegal. THE KING *v.* LOCKE **Div. Ct. 201**

—— Costs of unsuccessful prosecutions—Prosecutions before borough justices - **951**
See LOCAL GOVERNMENT. 2.

COSTS — Bankruptcy — Taxation — Trustee's solicitor's bill of costs—Notice of taxation not given to new trustee - **346**
See BANKRUPTCY. 1.

—— Company — Winding-up — Jurisdiction to order official receiver to pay costs personally - - - - - **697**
See COMPANY. 4.

—— Lands Clauses Acts—Arbitration — Costs — Offer by promoters — Conditional offer - - - - - - **252**
See LANDS CLAUSES ACTS.

—— Licensing Acts — Practice — Appeal from decision of Inland Revenue Commissioners—Discretion to order payment of costs by Commissioners - - **257**
See LICENSING ACTS. 2.

—— Offences — Sale of unsound meat — Seizure — Prosecution — Acquittal — Compensation—Costs of defending prosecution - - - - - **471**
See LOCAL GOVERNMENT. 3.

—— Prosecutions before borough justices —Costs of unsuccessful prosecutions
See LOCAL GOVERNMENT. 2. **951**

—— Solicitor — Costs — Taxation — Delivery of bill of costs — Default — Motion for attachment—Order for payment of costs of motion—Enforcement - **9**
See PRACTICE. 1.

—— Stay of execution pending appeal — Jurisdiction of county court judge—Order that a sum for security for costs be paid into Court - - - **161**
See COUNTY COURT. 1.

—— Taxation — Non-contentious business — Jurisdiction — Proper officer — District Registrar of Manchester - - **713**
See PRACTICE. 2.

COUNTY COURT — *Stay of Execution pending Appeal—Practice—Jurisdiction of County Court Judge—Order that a Sum for Security for Costs be paid into Court—Money "affected by the judgment"—Rules of the Supreme Court*, 1883, *Order LIX., r.* 14.
By Order LIX., r. 14, of the Rules of the Supreme Court, 1883, an appeal from an inferior Court is not to operate as a stay of proceedings unless the inferior Court so orders, or unless within ten days after the decision a deposit is made of or security given to the satisfaction of the inferior Court for a sum to be fixed by that Court, not exceeding "the amount of the money or the value of the property affected by the judgment":—
Held, that the "money affected by the judgment" includes costs, and that therefore a county court judge has jurisdiction to order a defendant against whom judgment for a sum of money and costs has been given, and who desires to appeal, to deposit in Court or give security for a sum for costs in addition to the amount for which judgment has been given as a condition precedent to the appeal operating as a stay of proceedings. GRIMSHAW, BAXTER & ELLIOTT, LIMITED *v.* PARKER - **Div. Ct. 161**

2. —— *Trial — Right to have Action tried with Jury—Amount claimed not exceeding 5l.—Enforcement of Right relating to Land—County Courts Act*, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 101—*County Court Rules*, 1903, *Order XXII., r.* 3.
The plaintiff, who was the owner of certain land, demised the exclusive right of sporting and shooting over the land for two years to a person who employed the defendant as his head gamekeeper. A fire having broken out in the heather on the land, the defendant, thinking that the means taken by the plaintiff's men would not be successful in extinguishing it, set fire to certain strips of heather on the land to leeward of the approaching conflagration in order that the fire might be checked when it reached the places where the strips of heather had already been burnt down by him. The plaintiff brought an action in the county court claiming 10*s.* damages for trespass and an injunction. The defendant contended that it was necessary for the preservation of his employer's sporting rights over the land to use the above means for extinguishing the fire, and he gave notice requiring the action to be tried with a jury:—
Held, that the action was brought to enforce a right relating to land and for the recovery of damages in respect thereof within the meaning of Order XXII., r. 3, of the County Court Rules, 1903, and that therefore the defendant was entitled to have the action tried with a jury. THE KING *v.* SURREY COUNTY COURT JUDGE **Div. Ct. 410**

—— Employer and workman.
See under EMPLOYER AND WORKMAN.

COUNTY COURT RULES, 1903, ORDER XXII., r. 3. - - - - - - **410**
See COUNTY COURT. 2.

COVENANT — By husband to settle after-acquired furniture — Bankruptcy of husband - - - - - **1049**
See BANKRUPTCY. 3.

—— Landlord and tenant.
See under LANDLORD AND TENANT.

—— Rent-charge—Personal covenant to pay—Remedy when barred - - - **370**
See LIMITATION OF ACTION.

CRIMINAL LAW—*False Pretences—Evidence of other Frauds — Admissibility — Questions tending to shew that Prisoner has committed Offence other than that with which he is charged and is of Bad Character—Opening Speech for Defence—Evidence of Good Character—Admissibility of Evidence of Bad Character—Criminal Evidence Act*, 1898 (61 & 62 *Vict. c.* 36), *s.* 1 (*f*).

Whether a question put to a person charged with a crime and called as a witness tends to shew, within the meaning of s. 1, clause (*f*), of the Criminal Evidence Act, 1898, that he has committed or been convicted of or charged with any offence other than that with which he is then charged cannot be decided by looking merely at the single question. Each question must be judged by the light of others asked before and after. The object of the enactment is that it should not, except in the specified circumstances, be suggested to the minds of the jury by means of any questions put to the prisoner that he has committed another offence. Any question or series of questions which would reasonably lead a jury to believe that he had committed another offence would tend to shew that the prisoner had committed that other offence. If a question does so tend, it is quite immaterial whether it would be admissible on other grounds. It is the duty of the judge not to wait for any objection to the question from the prisoner's counsel, but to stop the question himself, and to direct the jury to disregard it and not allow it to influence their minds.

A general examination on behalf of a prisoner as to the surrounding circumstances is not evidence of good character so as to entitle the prosecution to prove or to cross-examine as to other offences or convictions. Sub-clause (ii.) of clause (*f*), s. 1, of the Criminal Evidence Act, 1898, is intended to apply to cases where witnesses to character are called, or where evidence of the good character of the prisoner is sought to be elicited from the witnesses for the prosecution. It is to this class of evidence that the statute refers, not to mere assertions of innocence or repudiation of guilt on the part of the prisoner, nor to reasons given by him for such assertion or repudiation.

The appellant was convicted upon an indictment for obtaining from D. cheques by false pretences. The indictment alleged that he sold various articles of virtù to D. under an agreement that he was to charge D. the cost price plus 10 per cent. profit; that the appellant represented to D. that the cost was much in excess of the real cost; and that by this means he had obtained from D. much larger sums than he was entitled to. The appellant gave evidence on his own behalf, and in cross-examination questions were put to him suggesting that in other transactions he had obtained money from D. by alleging that certain china figures were genuine pieces of old Dresden china, whereas he knew that they were not:—

Held, that the alleged false pretences in representing the articles to be genuine old Dresden china when they were not so were entirely distinct from those with which the prisoner was charged, and that, as upon that ground evidence of the false representations

CRIMINAL LAW—*continued.*

with regard to the articles being genuine old Dresden china was not admissible to shew that he was guilty of the false pretences with which he was charged, the questions put in cross-examination were improperly allowed, inasmuch as they tended to shew that the appellant had committed an offence other than that with which he was charged, and that the conviction must be quashed, as the jury must have been influenced by the questions and answers. THE KING *v.* ELLIS - - - - **C. C. A. 746**

2. —— *Murder—Indictment for Murder—Conviction for Attempt—Punishment—Criminal Procedure Act*, 1851 (14 & 15 *Vict. c.* 100), *s.* 9—*Offences Against the Person Act*, 1861 (24 & 25 *Vict. c.* 100), *ss.* 11—15.

A person who upon an indictment charging him with murder is convicted under s. 9 of the Criminal Procedure Act, 1851, of an attempt to murder may be sentenced to penal servitude for life by virtue of the provisions of ss. 11—15 of the Offences Against the Person Act, 1861. The KING *v.* WHITE - - - **C. C. A. 124**

3. —— *Statement made in Presence of Prisoner—Admissibility of Contents—Evidence of Acknowledgment of its Truth—Direction to Jury—Misdirection—Appeal—"No substantial miscarriage of justice"—Criminal Appeal Act*, 1907 (7 *Edw.* 7, *c.* 23), *s.* 4, *sub-s.* 1.

The contents of a statement alleged to have been made in the presence of a prisoner cannot be given in evidence unless and until the judge has satisfied himself, from the evidence contained in the depositions or given at the trial, that there is evidence, fit to be submitted to the jury, that the prisoner by his answer to the statement, whether given in words or by conduct, acknowledged the truth of the statement.

If the contents of the statement are admissible in evidence, in accordance with the above rule, the jury should be directed that they are entitled to take the statement into consideration as evidence in the case, not because the statement is evidence of the matters contained in it, but solely because of the prisoner's acknowledgment of its truth.

Where there has been a misdirection of the jury an appeal will not be dismissed under s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, on the ground "that no substantial miscarriage of justice has actually occurred," unless the Court is satisfied that the jury, if properly directed, would, not might, have found the prisoner guilty. THE KING *v.* NORTON - - - **C. C. A. 496**

—— Fugitive offender — Appeal — Criminal cause or matter—Application to Court of Appeal - - - - - **1056**
See HABEAS CORPUS. 1.

CROWN—Habeas corpus—Foreign country in which the Crown has jurisdiction—Protectorate - - - - **576**
See HABEAS CORPUS. 2.

DAMAGE—Public health—Offences—Unsound meat—Seizure—Prosecution—Acquittal
See LOCAL GOVERNMENT. 3. **471**

DAMAGES—*Remoteness—Breach of Contract—Contingent Profits.*

It was agreed at the beginning of 1908 between the plaintiff, who was a breeder of race-horses, and the defendant, who was the owner of a stallion, that the defendant's stallion should during the season of 1909 serve one of the plaintiff's brood mares in consideration of a sum of 315*l.* to be paid by the plaintiff to the defendant at the time of the service. The defendant in the summer of 1908 sold the horse to a purchaser in South America, and thus precluded himself from carrying out the contract. In an action for breach of contract, the plaintiff gave evidence that the profit he had made from the sale of foals by the same stallion out of other mares belonging to him considerably exceeded the 315*l.*, and he claimed damages upon the footing that he had in all probability lost a valuable foal :—

Held, that the damages claimed were too remote and contingent, and that the plaintiff was only entitled to nominal damages. SAPWELL *v.* BASS - - - - - - **Jelf J. 486**

—— Shipping — Lien for "dead freight"—Unliquidated damages for short loading *See* SHIPPING. 3. **309**

—— Tramcar, Accident to—Liability of contractor to lessee - - - - **965** *See* TRAMWAYS.

DEBENTURE-HOLDERS AND DEBENTURES —Company. *See* under COMPANY.

DEBT—Judgment debt—Assignment of part—Rights of assignee — Leave to issue execution - - - - - - **636** *See* ASSIGNMENT. 1.

—— Part of debt—Right of assignee to sue **630** *See* ASSIGNMENT. 2.

—— Set-off — Mutual debts—Assignment to defendant of debt owed by plaintiff to third person - - - - **643** *See* SET-OFF.

—— Writ of extent—Affidavit of debt and danger — Sufficiency of affidavit—Motion to set aside writ - - **543** *See* REVENUE. 3.

DEMURRAGE — Shipping — Charterparty — Demurrage clause—No time specified for demurrage—Rights of parties **405** *See* SHIPPING. 1.

DESERTION — Separation order — Lunatic—Irremovability — Appeal to quarter sessions - - - - - - **16** *See* POOR LAW.

DEVIATION—Shipping—Putting into port of refuge—Unseaworthiness—Effect of on contract of carriage - - - **309** *See* SHIPPING. 3.

DIRECTORS—Dividend—Payment by dividend warrant — Lost warrant—Action by shareholder—Plea of payment—Powers of directors - - - - - **509** *See* COMPANY. 3.

DISCOVERY—Bankruptcy—Interrogatories **59** *See* BANKRUPTCY. 2.

DISEASE—Sewer gas—Workmen's compensation—Notice of accident—Prejudice to employer - - - - - - **677** *See* EMPLOYER AND WORKMAN. 4.

DISPUTES—Set-off of employer's claim for damages against workman's wages **445** *See* EMPLOYER AND WORKMAN. 11.

DISTRESS—Protected goods—Reputed ownership - - - - - - - **84** *See* LANDLORD AND TENANT. 1.

DIVIDEND—Payment by dividend warrant—Lost warrant—Action by shareholder—Plea of payment—Powers of directors *See* COMPANY. 3. **509**

EDUCATION. *See* under SCHOOLS.

ELEMENTARY EDUCATION. *See* under SCHOOLS.

EMPLOYER AND WORKMAN—*Compensation—Cashier — Murder — Risks incidental to the Employment—Accident arising out of the Employment—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A cashier, while travelling in a railway carriage to a colliery with a large sum of money for the payment of his employers' workmen, was robbed and murdered. On an application by his widow for compensation :—

Held, that the murder was an "accident" from the standpoint of the person who suffered from it, and that it arose "out of" an employment which involved more than the ordinary risk, and consequently that the widow was entitled to compensation under the Workmen's Compensation Act, 1906, s. 1, sub-s. 1.

Challis v. *London and South Western Ry. Co.*, [1905] 2 K. B. 154, applied. NISBET *v.* RAYNE & BURN - - - - **C. A. 689**

2. —— *Compensation — Coal — Injury by Accident—Custom to receive Allowance Coal during Incapacity—Assessment of Compensation under Workmen's Compensation Act—Right to sue Employer for Allowance Coal—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 2 (*b*) ; *Sched. I., clauses* 1 (*b*), 3.

The plaintiff was employed by the defendants as a miner in their colliery. There was a custom in collieries in the district that a miner was entitled, in addition to his wages, to (1.) a load of allowance coal every twenty-four turns while in work, and (2.) a load of allowance coal every five weeks during incapacity caused by accident. The plaintiff, having been incapacitated for work by an accident arising out of and in the course of his employment, was awarded a weekly payment during incapacity as compensation under the Workmen's Compensation Act, 1906. In an action to recover the allowance coal for the period since the date of the accident or its value :—

Held, that the right to the allowance coal

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under the custom formed one of the terms of the plaintiff's contract of employment and was not in the nature of compensation for the injury, and that therefore he was not debarred by s. 1, sub-s. 2 (*b*), of the Workmen's Compensation Act, 1906, from maintaining the action. SIMMONDS *v.* STOURBRIDGE GLAZED BRICK AND FIRE CLAY COMPANY - - **Div. Ct. 269**

3. —— *Compensation—Company—Winding-up—Insurance—Liability of Insurers—Arbitration Clause in Policy—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 5, *sub-s.* 1.

In the case of bankruptcy or winding-up of an employer who is insured s. 5 of the Workmen's Compensation Act, 1906, only gives the workman the same right against the insurers as the employer would have had. Where a policy of insurance contains a clause that any dispute between the insured and the insurers shall be referred to arbitration under the Arbitration Act, and that an award under that Act shall be a condition precedent to any right of action against the assured, and there is a bona fide dispute, a workman cannot take proceedings in the county court to have compensation awarded until the matter has been referred to arbitration under the Arbitration Act and an award obtained. KING *v.* PHŒNIX ASSURANCE COMPANY - - - - - - **C. A. 666**

4. —— *Compensation—Disease—Sewer Gas—Ptomaine Poisoning—Notice of Accident—Prejudice to Employer—Reasonable Cause—Injury by Accident—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), s. 1, *sub-s.* 1; *s.* 2, *sub-s.* 1 (*a*); *s.* 8.

An objection that an employer has been prejudiced in his defence to a claim for compensation under the Workmen's Compensation Act, 1906, by the want, defect, or inaccuracy of a notice under s. 2, sub-s. 1, may be satisfied by shewing that such want, defect, or inaccuracy has been occasioned by a "reasonable cause" under the later part of proviso (*a*), which is independent of the earlier part.

Except in the case of the industrial diseases provided for by s. 8, unless the applicant can indicate the time, day, circumstance, and place in which the accident occurred which occasioned the disease, by means of some definite event, a case of "injury by accident" within the meaning of s. 1, sub-s. 1, of the Act cannot be established.

Brintons, Ld. v. *Turvey*, [1905] A. C. 230, and *Broderick* v. *London County Council*, [1908] 2 K. B. 807, explained. EKE *v.* HART-DYKE **C. A. 677**

5. —— *Compensation — Infant — Permanent Incapacity—Committee representative of an Employer and his Workmen—Award of Lump Sum—Infant—Payment into Court—Excess of Jurisdiction—Duty to record Award—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., par.* 17; *Sched. II., pars.* 1, 9.

Where there exists under par. 1 of the Second Schedule to the Workmen's Compensation Act, 1906, a committee representative of an employer and his workmen with power to settle matters under the Act, which means with the function as incident to its constitution of settling matters under the Act, that is the tribunal to which for the purpose of settling any matter which under the Act is to be settled by arbitration the parties are to resort, subject to the right of either party by notice in writing within the time prescribed by the Act to object; it is not necessary that each individual workman should upon entering the employment have expressly or impliedly agreed to refer any dispute under the Act to such committee.

Semble, per Cozens-Hardy M.R. and Kennedy L.J., the award of such committee upon any matter within its jurisdiction is binding on an infant.

Where the award of such committee relates to a matter required by the Act to be settled by arbitration it is the duty of the registrar of the county court on being satisfied as to its genuineness to record it, and the judge has no jurisdiction to review it; but where the award is outside the jurisdiction of the committee there is no obligation to record it.

There is no jurisdiction under the Act to award a lump sum to a workman who is incapacitated by an accident except under par. 17 of the First Schedule, which is limited to the case where a weekly payment has been continued for not less than six months.

Where, therefore, a workman, who was a minor, met with an accident whereby he lost two fingers, and, after his employers had paid him a weekly sum for five months and had taken him back to work, referred the question of compensation in respect of his permanent injury to a committee representative of the employers and their workmen, and the committee awarded him a lump sum and paid the money into the county court:—

Held, that the county court judge was not bound to record a memorandum of the award and that the money paid into Court ought to be paid out to the employers. MULLHOLLAND *v.* WHITEHAVEN COLLIERY COMPANY **C. A. 278**

6. —— *Compensation — Nervous Shock — Neurasthenia—Earning Capacity of Workman—Accident—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

A nervous shock caused by the excitement and alarm resulting from a fatal accident to a fellow workman while engaged in the employment:—

Held to be a case of "personal injury by accident arising out of and in the course of the employment" within the Workmen's Compensation Act, 1906.

Nervous shock causing incapacity to work is as much "personal injury by accident" as a broken limb or other physical injury. YATES *v.* SOUTH KIRKBY, &C., COLLIERIES, LIMITED **C. A. 538**

7. —— *Compensation — Review of Weekly Payments — Prospective Order — Award terminating Payments at a future date—Jurisdiction of Arbitrator—Onus of Proof—Workmen's Com-*

EMPLOYER AND WORKMAN—*continued.*

pensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.* (16.).

On an application to review weekly payments under the Workmen's Compensation Act, 1906, an arbitrator has no jurisdiction to make a prospective award terminating the payments at a given date. An arbitrator has only jurisdiction to award payments during the incapacity of the workman, and his duty is to ascertain what is the workman's earning capacity at the date of the application and to award accordingly, leaving it to the employer to apply for a reduction in the event of the workman's recovery. A prospective award is also wrong inasmuch as it shifts the onus of proof from the employer to the workman in a way that may be unfair to the workman.

Allan v. *Thomas Spowart & Co., Ld.*, (1906) 43 Sc. L. R. 599, approved. BAKER *v.* JEWELL **C. A. 673**

8. —— *Compensation — Shipping — Seaman returning to Ship—Accident arising out of and in Course of Employment—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

An engineer on a ship which was lying in dry dock, after completing his morning's work of getting stores on board, went home to his dinner, and on his return fell into the dry dock, where his dead body was found :—

Held, that there was no evidence that the accident arose out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1906, and that his dependants were not entitled to compensation. GILBERT *v.* OWNERS OF STEAM TRAWLER NIZAM - - - - - - - **C. A. 555**

9. —— *Compensation — Sub-contracting — "Work undertaken by the principal"—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 4, *sub-s.* 1.

To constitute a man a principal under s. 4, sub-s. 1, of the Workmen's Compensation Act, 1906, the existence of both a head contract and a sub-contract is not necessary; the section extends to the case of a man who for the purposes of his trade or business undertakes work on his own account, and employs a contractor to do the whole or part of the work, provided that the work is such as the person employing the contractor usually undertakes for another in the ordinary course of his trade or business, but not otherwise.

Therefore where two shopkeepers and a billiard saloon keeper proposed to open a skating rink and purchased an existing iron building for that purpose, and contracted with a builder for the removal and re-erection of the building, and a workman employed by the builder in the re-erection met with an accident arising out of and in the course of his employment and applied for compensation against the purchasers of the building :—

Held, that the work of re-erection was not work "undertaken" by the respondents within the meaning of the Act, and that the applicant was not entitled to compensation against them. SKATES *v.* JONES & CO. - - - **C. A. 903**

EMPLOYER AND WORKMAN—*continued.*

10. —— *Compensation — Taxi-cab Driver — "Workman" — "Contract of Service"—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *ss.* 1, 13.

The driver of a taxi-cab while using it sustained injuries from the effects of which he died. His widow claimed compensation under the Workmen's Compensation Act, 1906, against the respondents, a company, who owned the cab. The company's drivers were paid a percentage of the takings registered by the taximeters of the cabs. When a driver took out a cab from the yard he went where he pleased and kept the cab, sometimes until the next day or for several days, and, except by refusing to let a driver have a cab the next time he applied for one, the company had no control over and could not dismiss him :—

Held, that the relation between the company and the deceased driver was not that of master and servant, and that the claimant was not entitled to compensation. DOGGETT *v.* WATERLOO TAXI-CAB COMPANY - - - **C. A. 336**

11. —— *Dispute between Employer and Workman—Subsisting Claims—Jurisdiction of Court of Summary Jurisdiction to adjust and set off—Set-off of Employer's Claim for Damages against Workman's Wages—Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *s.* 3, *sub-s.* 1; *s.* 4.

By s. 3, sub-s. 1, of the Employers and Workmen Act, 1875, in any proceeding before a county court in relation to any dispute between an employer and a workman arising out of or incidental to their relation as such, the Court may adjust and set off all such claims on the part either of the employer or of the workman, arising out of or incidental to the relation between them, as the Court may find to be subsisting. By s. 4 a similar jurisdiction (up to a limited amount) is conferred upon Courts of summary jurisdiction.

An employer preferred a summons against a workman in a Court of summary jurisdiction, claiming (1.) damages for breach of contract by reason of the workman having wrongfully absented himself from his work, and (2.) that the wages earned by and due to the workman should be ascertained, and that the respective claims for damages and wages should be adjusted and set off by the Court. The workman made no claim for his wages in the Court of summary jurisdiction and contended that the Court had no jurisdiction to set off the damages against a claim for wages which had not in fact been made by him :—

Held by Vaughan Williams L.J. and Farwell L.J. (Fletcher Moulton L.J. dissenting), that the jurisdiction of the Court under ss. 3 and 4 of the Act extended to the adjustment of all subsisting claims between the parties, and that as the workman's claim for wages, although not put forward by the workman himself, had been brought to the knowledge of the Court by the employer, the Court had jurisdiction to set off that claim against the employer's claim for damages.

Decision of the Divisional Court, [1910] 1 K. B.

EMPLOYER AND WORKMAN—*continued.*
386, affirmed. KEATES *v.* LEWIS MERTHYR CONSOLIDATED COLLIERIES, LIMITED **C. A. 445**

—— Male servant—"House porter" - **379**
See REVENUE. 1.

ESTOPPEL — *Res Judicata — Landlord and Tenant—Agreement for Lease—Action for Rent — Defence, no concluded Agreement — Second Action—Defence, Statute of Frauds—Statute of Frauds*, 1677 (29 *Car.* 2, *c.* 3), *s.* 4.
The plaintiff brought an action for arrears of rent alleged to be due under an agreement for a lease. The defendant relied on the defence that no agreement had been concluded, but did not raise any defence under s. 4 of the Statute of Frauds. Judgment was given for the plaintiff.
Further arrears of rent having accrued due, the plaintiff brought a second action. In this action the defendant raised the defence that there was no memorandum or note in writing of the agreement for the lease sufficient to satisfy the requirements of s. 4 of the Statute of Frauds:—
Held, that the defendant, not having raised this defence in the former action, was precluded from raising it in the second action.
Decision of the Divisional Court, [1910] 1 K. B. 796, affirmed. HUMPHRIES *v.* HUMPHRIES **C. A. 531**

—— Habeas corpus — Appeal — Estoppel by judgment—Res judicata — Absence of adjudication as of record - **1056**
See HABEAS CORPUS. 1.

EVIDENCE—False pretences—Evidence of other frauds — Admissibility — Evidence of good character—Admissibility of evidence of bad character - - **746**
See CRIMINAL LAW. 1.

—— Sale of goods — Contract — Warranty — Implied condition as to fitness - **831**
See SALE OF GOODS. 1.

—— Statement made in presence of prisoner—Admissibility of contents—Evidence of acknowledgment of its truth - **496**
See CRIMINAL LAW. 3.

EXECUTION—Judgment debt—Assignment of part—Rights of assignee—Leave to issue execution - - - - **636**
See ASSIGNMENT. 1.

—— Stay of execution pending appeal—Jurisdiction of county court judge - **161**
See COUNTY COURT. 1.

EXECUTION CREDITOR—Wrongful seizure — Debt paid before issue of writ—Absence of malice—Trespass - - - **244**
See SHERIFF.

EXTENT, WRIT OF—Affidavit of debt and danger—Sufficiency of affidavit - **543**
See REVENUE. 3.

FALSE PRETENCES—Criminal law—Evidence of other frauds—Admissibility - **746**
See CRIMINAL LAW. 1.

FIDELITY BOND—Surety—Default of trustee—Penal interest—Liability of surety **649**
See BANKRUPTCY. 5.

FINANCE ACT—Costs—Licensing Acts—Discretion to order payment of costs by Commissioners - - - - **257**
See LICENSING ACTS. 2.

FIRE INSURANCE.
See under INSURANCE (FIRE).

FISHERY ACTS—*Water Bailiff—Powers of—Right to search Suspected Person's Pocket—"Bag or other instrument used in carrying fish"—Salmon Fishery Act*, 1873 (36 *&* 37 *Vict. c.* 71), *s.* 36, *sub-s.* 3.
By s. 36 of the Salmon Fishery Act, 1873, "Any water bailiff appointed under the Salmon Fishery Acts, 1861 to 1873, acting within the limits of his district may . . . . (3.) Search and examine all nets, baskets, bags, or other instruments used in fishing or in carrying fish by persons whom there is reasonable cause to suspect of having possession of fish illegally caught"; and any person refusing to allow such a search is to be liable to a penalty.
On the hearing of an information against the respondent for a refusal to allow his pocket to be searched under the above section the justices found that the pockets of men's coats were frequently used for the purpose of carrying fish:—
Held that, having regard to that finding, the respondent's pocket was a "bag or other instrument" within the meaning of the section. TAYLOR *v.* PRITCHARD - - **Div. Ct. 320**

FLATS—Male servant—"House porter"—Porter employed at block of flats - - **379**
See REVENUE. 1.

FLOATING SECURITY—Company—Debentures—Garnishee order - - - **979**
See COMPANY. 1.

FOREIGN COMPANY — Service of notice of motion to set aside award on foreign company out of jurisdiction—Practice
See ARBITRATION. 2. **727**

FOREIGN JURISDICTION — Habeas corpus—Foreign country in which the Crown has jurisdiction—Protectorate - **576**
See HABEAS CORPUS. 2.

FRAUD — Company — Winding-up — Report alleging fraud—Jurisdiction to order official receiver to pay costs personally
See COMPANY. 4. **697**

—— Criminal law—Evidence of other frauds—Admissibility - - - - **746**
See CRIMINAL LAW. 1.

—— Petitioning creditor's debt — Judgment—Action by bankrupt to set aside judgment on ground of fraud—Jurisdiction
See BANKRUPTCY. 4. **229**

FRAUDS, STATUTE OF—Contract—Possible performance by one party within the year—Intention - - - - - - **522**
See CONTRACT.

—— Contract not to be performed within a year—Writing signed by the party to be charged - - - - - - **776**
See SALE OF GOODS. 2.

—— Res judicata — Lease, Agreement for — Action for rent—Defence, no concluded agreement—Second action — Defence, Statute of Frauds - - - **531**
See ESTOPPEL.

FREIGHT—Company—Receiver and manager, Powers of — Shipment of goods by receiver—Bill of lading—Lien for previously unsatisfied freight - - **813**
See COMPANY. 2.

—— Shipping—Lien for "dead freight"—Unliquidated damages for short loading
See SHIPPING. 3. **309**

FUGITIVE OFFENDER — Habeas corpus — Appeal — Criminal cause or matter—Application to Court of Appeal - **1056**
See HABEAS CORPUS. 1.

GAME—*Ground Game—Occupier with Sporting Rights—Prohibition against setting Spring Traps except in Rabbit Holes—Ground Game Act*, 1880 (43 & 44 *Vict. c.* 47), *s.* 6.

Sect. 6 of the Ground Game Act, 1880, after providing that no person having a right of killing ground game under this Act or otherwise shall use any firearms for the purpose of killing ground game between certain hours, proceeds to enact that "no such person shall, for the purpose of killing ground game, employ spring traps except in rabbit holes":—

Held, that this enactment applies to an occupier of land who, by reason of the owner not having reserved the sporting rights, has the right, apart from the Act, of killing and taking game upon the land.

Saunders v. *Pitfield*, (1888) 58 L. T. 108, followed. WATERS *v.* PHILLIPS **Div. Ct. 465**

GAMING—Betting.
See under BETTING.

GARNISHEE — Garnishee order — Company — Debentures—Floating security - **979**
See COMPANY. 1.

GOODS—Dangerous goods—Common carrier—Duty of consignor to inform carrier of nature of goods - - - - - **94**
See CARRIER.

—— Sale of goods.
See under SALE OF GOODS.

GROUND GAME.
See under GAME.

HABEAS CORPUS—*Appeal—Criminal Cause or Matter—Practice—Fugitive Offender — Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 47—*Application to Court of Appeal under Fugitive Offenders Act*, 1881 (44 & 45 *Vict. c.* 69), *s.* 10—*Estoppel by Judgment—Res Judicata—Absence of Adjudication as of Record.*

An appeal will not lie to the Court of Appeal against the refusal of a Divisional Court to issue a writ of habeas corpus in the case of a prisoner committed under the Fugitive Offenders Act, 1881.

An order nisi for a habeas corpus was obtained in the King's Bench Division on the application of a person in custody under the Fugitive Offenders Act, 1881, but was afterwards discharged. The affidavit upon which the order nisi was obtained stated (inter alia) matters material as grounds for the exercise of the power given by the Fugitive Offenders Act, 1881, s. 10, but the order nisi was in form simply for a habeas corpus, and not, in the alternative, for relief to the prisoner under s. 10. On the argument of the order nisi the matters referred to in the affidavit as aforesaid were discussed, and the Court in giving judgment pronounced them insufficient as grounds for the exercise of the powers given by s. 10 of the before-mentioned Act in favour of the prisoner. The order ultimately drawn up was, however, simply for discharge of the order nisi for a habeas corpus. An application was subsequently made to the Court of Appeal to exercise the powers given by s. 10, as having original jurisdiction in that behalf under the Act concurrently with the High Court. A preliminary objection was taken to the hearing of the application on the ground that the matter had been previously adjudicated upon by the King's Bench Division, and was therefore res judicata:—

Held, by Vaughan Williams L.J., Fletcher Moulton L.J., and Buckley L.J., that inasmuch as the only matter adjudicated upon by the order of the King's Bench Division, as drawn up, was that the order nisi for a habeas corpus should be discharged, the matter of the application to the Court of Appeal was not res judicata, and (Buckley L.J. doubting) that the Court of Appeal had original jurisdiction to entertain the application.

Quære, whether, in a case where an application for relief under s. 10 of the Fugitive Offenders Act, 1881, has been adjudicated upon, and an order has been made dismissing the same in the High Court, it is competent for the applicant to make a similar application to the Court of Appeal. THE KING *v.* GOVERNOR OF BRIXTON PRISON. *Ex parte* SAVARKAR - **C. A. 1056**

2. —— *Foreign Country in which the Crown has Jurisdiction—Protectorate—Foreign Jurisdiction Act*, 1890 (53 & 54 *Vict. c.* 37)—*Order in Council — Proclamation — Validity — Arbitrary Arrest—Act of State—Person having Custody of Prisoner — Secretary of State for Colonies—"Foreign Dominion of the Crown"*—16 *Car.* 1, *c.* 10, *ss.* 6, 8—*Habeas Corpus Act*, 1862 (25 & 26 *Vict. c.* 20), *s.* 1.

By an Order in Council, dated May 9, 1891, made "in exercise of the powers by the Foreign Jurisdiction Act, 1890, or otherwise in Her Majesty vested," the High Commissioner for

HABEAS CORPUS—*continued.*
South Africa was authorized to exercise in the Bechuanaland Protectorate the powers of Her Majesty, and to do all such things "as are lawful," and to provide by proclamation for the administration of justice and generally for the peace, order, and good government of all persons within the Protectorate, including the prohibition and punishment of all acts tending to disturb the public peace.

One Sekgome, who claimed to be the chief of a native tribe in the Protectorate, was detained in custody at a place within the Protectorate by virtue of a proclamation authorizing his detention, and expressed to have been made by the High Commissioner, under the powers conferred on him by the Order in Council, on the ground that the detention of Sekgome was necessary for the preservation of peace within the Protectorate.

On an application by Sekgome for a writ of habeas corpus to the Secretary of State for the Colonies :—

Held (affirming an order of the Divisional Court dismissing the application), that the Protectorate was a foreign country in which His Majesty had jurisdiction within the meaning of the Foreign Jurisdiction Act, 1890; that the proclamation was validly made under the powers conferred by the Order in Council; and that the detention of Sekgome was, therefore, lawful.

Sprigg v. *Sigcau*, [1897] A. C. 238, distinguished.

Held, also, by Vaughan Williams and Kennedy L.JJ., that the Protectorate was not a "foreign dominion of the Crown" within s. 1 of the Habeas Corpus Act, 1862.

Quære, whether, in any event, the Secretary of State for the Colonies was a person having the custody of Sekgome to whom a writ of habeas corpus could be issued. THE KING *v.* EARL OF CREWE. *Ex parte* SEKGOME - **C. A. 576**

HIGHWAY—*Locomotive— Licence — Exemption —"Agricultural locomotive" — Locomotive used solely for Agricultural Purpose—Hauling Wheat to Mill to be ground—Locomotives Act*, 1898 (61 & 62 *Vict. c.* 29), *s.* 9, *sub-ss.* 1, 9; *s.* 10; *s.* 17.

By s. 9, sub-s. 1, of the Locomotives Act, 1898, every locomotive to which the Act applies shall be licensed by a county council, provided that this enactment shall not apply to any agricultural locomotive, to any locomotive not used for haulage purposes, to any steam roller, or to any locomotive belonging to a road authority when used by them within their district. By s. 17, the expression "agricultural locomotive" includes "any locomotive used solely for threshing, ploughing, or any other agricultural purpose."

A threshing engine was let out on hire by the appellants to a farmer to thresh wheat and to haul the wheat, when threshed, in trucks to a mill to be ground. There was no evidence as to whether the farmer had sold the wheat or whether it was to be returned to the farm when ground. The trucks were the property of the appellants :—

Held, that the engine, when being used for hauling the wheat to the mill, was not being used for an agricultural purpose, and was therefore at the time not an agricultural locomotive within the exemption in s. 9, sub-s. 1, of the Act. HODDELL *v.* PARKER - **Div. Ct. 323**

HIGHWAY—*continued.*

HORSES—Carcases of dead horses—Receiving—Licence—Public yard - - - **39**
See LONDON.

HOTEL—Manager of—Undisclosed principal—Licence taken out in name of manager—Presumption as to hotel being tied
See PRINCIPAL AND AGENT. **389**

INCOME TAX.
See under REVENUE.

INFANT—Betting circular—Circular sent to undergraduate—Presumption of knowledge of infancy - - - - **118**
See BETTING CIRCULAR.

—— Workmen's compensation — Committee representative of an employer and his workmen—Award of lump sum—Payment into Court—Excess of jurisdiction **278**
See EMPLOYER AND WORKMAN. 5.

INFORMATION—Hearing of—Practice - **722**
See JUSTICES.

INLAND REVENUE.
See under REVENUE.

INSTALMENTS—Payment by—Bill of sale—Construction of statutory form - **731**
See BILL OF SALE.

INSURANCE — Workmen's compensation — Liability of insurers — Arbitration clause in policy - - - - **666**
See EMPLOYER AND WORKMAN. 3.

INSURANCE (FIRE)—*Contract of Fire Insurance made by Agent without Authority — Ratification by Principal after and with Knowledge of Loss by Fire—Whether Ratification valid in Law.*

Where a contract of fire insurance is made by one person on behalf of another without authority, it cannot be ratified by the party on whose behalf it is made after and with knowledge of the loss of the thing insured. GROVER & GROVER, LIMITED *v.* MATHEWS
Hamilton J. 401

INSURANCE (MARINE)—*Policy—Warranty —"Free from particular average and loss"—Meaning of—Understanding amongst Underwriters.*

A policy of marine insurance upon frozen meat expressed the period of the risk to be as follows: "Risk commencing at the freezing station works and includes a period of not exceeding sixty days after arrival of the vessel." It also contained the following clause :—"Warranted free from particular average and loss unless caused by stranding sinking burning or collision of the ship or craft." Owing to causes arising during the voyage other

INSURANCE (MARINE)—*continued.*
than the stranding, sinking, burning, or collision of the ship the meat arrived in such a condition that it had to be condemned as unfit for human food, and was consequently a total loss.

Hamilton J. found as a fact upon the evidence of underwriters that the words "Warranted free from particular average and loss" were a well-known formula used in connection with the insurance of frozen meat; that the words "and loss" in that formula were well understood amongst underwriters to mean all loss, total as well as partial; and that the clause, however inapt to express that meaning, was in fact intended to mean that the underwriters only undertook the marine risks of stranding, sinking, burning, or collision. He held that, notwithstanding the provision as to the risk commencing before and continuing after the termination of the voyage, the clause had that meaning in this policy, and he accordingly held that the underwriters were not liable for the loss. OTAGO FARMERS' CO-OPERATIVE ASSOCIATION OF NEW ZEALAND *v.* THOMPSON
Hamilton J. 145

INTEREST — Bankruptcy — Fidelity bond — Surety — Default of trustee — Penal interest—Liability of surety. - **649**
See BANKRUPTCY. 5.

INTERROGATORIES — Bankruptcy — Discovery - - - - - - - **59**
See BANKRUPTCY. 2.

JOINDER—Parties to action—Joinder of defendants—Joinder of different causes of action - - - - - - - **354**
See PRACTICE. 3.

JUDGMENT—Action by bankrupt to set aside judgment on ground of fraud—Jurisdiction - - - - - - **229**
See BANKRUPTCY. 4.

JUDGMENT DEBT—Assignment of part—Rights of assignee—Leave to issue execution
See ASSIGNMENT. 1. **636**

JUDICATURE ACT—Habeas corpus—Appeal—Criminal cause or matter — Fugitive offender — Application to Court of Appeal - - - - - - **1056**
See HABEAS CORPUS. 1.

—— Judgment debt — Assignment of part — Rights of assignee — Leave to issue execution - - - - - - **636**
See ASSIGNMENT. 1.

—— Mutual debts — Assignment to defendant of debt owed by plaintiff to third person - - - - - - - **643**
See SET-OFF.

—— Part of debt—Right of assignee to sue **630**
See ASSIGNMENT. 2.

JURISDICTION—Board of Education—Decision —Want of jurisdiction - - **165**
See SCHOOLS. 3.

JURISDICTION—*continued.*
—— County court.
See under COUNTY COURT.

—— Foreign country in which the Crown has jurisdiction — Habeas corpus — Protectorate - - - - - - - **576**
See HABEAS CORPUS. 2.

—— Judgment — Action by bankrupt to set aside judgment on ground of fraud **229**
See BANKRUPTCY. 4.

—— Railway Commissioners — Rates — Reasonable facilities — Agreed through rates
See RAILWAY. **913**

—— Service of notice of motion to set aside award on foreign company out of jurisdiction - - - - - - **727**
See ARBITRATION. 2.

—— Solicitor — Undertaking to pay money to person not client—Disciplinary jurisdiction of Court—Summary order for payment - - - - - - **296**
See SOLICITOR. 2.

—— Summary jurisdiction—Justices—Hearing of information—Absence of informant —Offer of justices to adjourn—Refusal of offer - - - - - - **722**
See JUSTICES.

—— Workmen's compensation.
See under EMPLOYER AND WORKMAN.

JURY—Direction to — Misdirection—Appeal—"No substantial miscarriage of justice"
See CRIMINAL LAW. 3. **496**

—— Trial—Enforcement of right relating to land - - - - - - - **410**
See COUNTY COURT. 2.

JUSTICES—*Practice — Hearing of Information — Advocacy by Police Officer — Absence of Informant—Offer of Justices to adjourn—Refusal of Offer—Waiver of Irregularity—Objection to Conviction — Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 13.

An information was preferred by the respondent against the appellant under s. 1, sub-s. 1, of the Motor Car Act, 1903, for driving a motor car at a speed which was dangerous to the public having regard to all the circumstances of the case. The appellant appeared before the justices with his solicitor at the hearing of the information, but the respondent was not present either personally or by counsel or solicitor.

A police officer, who was one of the witnesses for the prosecution, examined the other witnesses for the prosecution, and during the course of the case the appellant's solicitor requested the justices' clerk to make a note of the police officer's name. The justices thereupon announced that the case was adjourned. The appellant's solicitor, however, said that he preferred that the case should proceed. Accordingly the hearing proceeded and the appellant was convicted:—

Held, that the offer to adjourn having been declined by the appellant's solicitor, neither the

JUSTICES—*continued.*
absence of the respondent nor the fact that the police officer, although a witness, conducted the examination of the other witnesses for the prosecution invalidated the conviction. MAY *v.* BEELEY - - - - - **Div. Ct. 722**

—— Betting circular—Infant—Circular sent to undergraduate—Presumption of knowledge of infancy - - - - **118**
See BETTING CIRCULAR.

—— Carcases of dead horses — Receiving — Licence—Public yard - - - **39**
See LONDON.

—— Costs of unsuccessful prosecutions—Prosecutions before borough justices—No separate Court of quarter sessions—Justices Clerks Act, 1877 - - **951**
See LOCAL GOVERNMENT. 2.

—— Criminal law.
See under CRIMINAL LAW.

—— Fishery Acts—Water bailiff—Powers of—Right to search suspected person's pocket - - - - - - **320**
See FISHERY ACTS.

—— Ground game — Occupier with sporting rights — Prohibition against setting spring traps except in rabbit holes **465**
See GAME.

—— Habeas corpus—Appeal—Criminal cause or matter—Fugitive offender—Application to Court of Appeal - - **1056**
See HABEAS CORPUS. 1.

—— Highway.
See under HIGHWAY.

—— Licensing Acts.
See under LICENSING ACTS.

—— Live larks recently taken - - - **327**
See WILD BIRDS.

—— Lunatic, Pauper—Expenses of maintenance — Reasonable charges—Order of justices - - - - - - **547**
See LUNACY.

—— Money-lenders.
See under MONEY-LENDER.

—— Murder, Indictment for—Conviction for attempt—Punishment - - **124**
See CRIMINAL LAW. 2.

—— Pharmacy Acts—Sale of poison—Label—"Name" of seller - - - **766**
See PHARMACY ACTS.

—— Poor Law.
See under POOR LAW.

—— Public health—Offences—Sale of unsound meat — Seizure — Prosecution — Acquittal — Compensation — Costs of defending prosecution - - **471**
See LOCAL GOVERNMENT. 3.

JUSTICES—*continued.*
—— Schools—Blind or deaf child—Liability of guardians of union - - **559**
See SCHOOLS. 1.

LADING, BILL OF.
See under BILL OF LADING.

LAND—Trial—Right to have action tried with jury—Amount claimed not exceeding 5*l.*—Enforcement of right relating to land - - - - - - - **410**
See COUNTY COURT. 2.

LANDLORD AND TENANT — *Distress — Protected Goods—"Goods comprised in hire purchase agreement" — "Possession, order, or disposition" — Reputed Ownership — Law of Distress Amendment Act*, 1908 (8 *Edw.* 7, *c.* 53), *s.* 4.

Sects. 1 and 2 of the Law of Distress Amendment Act, 1908, protect under certain conditions from distress the goods of undertenants, lodgers, and other persons not being tenants and not having any beneficial interest in any tenancy of the premises.

By s. 4 the Act is not to apply to goods comprised in any bill of sale, hire purchase agreement, or settlement made by the tenant, nor to goods in the possession, order, or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant is the reputed owner thereof.

The defendant, a broker distraining for rent due to a landlord from his tenant, seized a pianoforte let by the plaintiffs to the wife of the tenant on a hire purchase agreement in consideration of monthly payments and on the terms that, in case of default in the punctual payment of the monthly sums, the plaintiffs might retake possession of the piano. At the date of the seizure the monthly payments were in arrear. The plaintiffs performed the conditions specified in ss. 1 and 2 of the Act. The defendant detained the piano.

On appeal from a county court in an action for illegal distress:—

Held, that the words "hire purchase agreement" in s. 4 mean hire purchase agreement to which the tenant is a party, and therefore that the piano was not "comprised in any hire purchase agreement" within the meaning of that section; that on the facts there was no evidence that the piano was in the possession, order, or disposition of the tenant by the consent and permission of the plaintiffs under such circumstances that the tenant was the reputed owner thereof; and consequently that the piano was not within the exception made by s. 4 to the protection conferred by ss. 1 and 2, and that the defendant was liable. SHENSTONE & CO. *v.* FREEMAN **Div. Ct. 84**

2. —— *Re-entry for Breaches of Covenant, Proviso for—Breach of Covenant not to underlet —Surrender of Lease—Acceptance of, by Lessor in Ignorance of Underlease—Reletting by Lessor*

LANDLORD AND TENANT—*continued.*

—Entry by new Tenant—Effect of, on Interest of Underlessee.

A tenant of a field under a lease containing a covenant not to underlet without licence, and a proviso that on breach of the covenant the lessor might re-enter, in breach of his covenant underlet it to the plaintiff on a yearly tenancy. Subsequently the tenant surrendered his term to the lessor, who accepted the surrender in ignorance of the sub-letting and of the fact of the plaintiff's occupation. The lessor then relet the field to the defendant, who, upon the plaintiff refusing to give up possession, entered and turned out the plaintiff's cattle. The plaintiff had received no notice to quit. In an action to recover possession of the land :—

Held, that the plaintiff was entitled to judgment :

By Darling J., upon the ground that, assuming that the lessor was not precluded by the surrender from enforcing his right to forfeit the plaintiff's interest, inasmuch as he had accepted the surrender without notice of that interest, the reletting to a new tenant and entry by that tenant did not operate as an entry by the lessor so as to effect a forfeiture, and that the plaintiff's interest was still subsisting.

By Bucknill J., upon the ground that the acceptance of the surrender by the lessor precluded him from subsequently forfeiting the plaintiff's interest, whether at the time of the surrender he had notice of that interest or not. PARKER *v.* JONES - - - **Div. Ct. 32**

3. —— *Rent—Assignment by Lessee of Part of Premises—Apportionment of Rent—Value of severed Parts—With reference to what date Value to be calculated.*

Where, premises having been let at a rent, the lessee assigns part of the premises to another, the value of the respective parts with reference to which the apportionment of the reserved rent is to be calculated is the value at the date of the severance, not that at the date of the lease granted. SALTS *v.* BATTERSBY - **Div. Ct. 155**

—— Rent, Action for—Defence, no concluded agreement—Second action—Defence, Statute of Frauds—Res judicata - **531**
See ESTOPPEL.

LANDS CLAUSES ACTS—*Arbitration—Costs—Offer by Promoters—Conditional Offer—Lands Clauses Consolidation Act*, 1845 (8 *&* 9 *Vict. c.* 18), *s.* 34.

By s. 34 of the Lands Clauses Consolidation Act, 1845, the costs of an arbitration under the Act are to be borne by the promoters of the undertaking in question unless the arbitrators award the same or a less sum than shall have been offered by the promoters, in which case each party is to bear his own costs.

A company were by a private Act incorporating the Lands Clauses Consolidation Act, 1845, empowered to construct a bridge and on completion thereof to divert a public footpath which crossed the plaintiff's land. The company having constructed the bridge diverted the footpath. The plaintiff claimed that his land was

LANDS CLAUSES ACTS—*continued.*

injuriously affected; he gave notice that he desired to have the amount of compensation settled by arbitration under the Lands Clauses Consolidation Act, 1845, and appointed an arbitrator. The company then sent to the plaintiff's solicitors a letter to this effect: "The company have made arrangements for the construction of a forty feet road which will put your client's property in direct connection with the new bridge and will more than counterbalance any injurious affection of that property by reason of the closing of the old footpath. The road will be made as soon as practicable, and on the understanding that it will be made we make your client an offer of 50*l.* in settlement of his claim." This offer was refused, and the parties proceeded to arbitration, in which 50*l.* was awarded to the plaintiff as compensation.

Upon a special case stated between the parties in an action by the plaintiff against the company to recover his costs of the arbitration :—

Held, that the offer contained in the above letter was not a good offer within s. 34 of the Lands Clauses Consolidation Act, 1845, in that it was ambiguous and embarrassing. FISHER *v.* GREAT WESTERN RAILWAY COMPANY
Phillimore J. 252

LARKS—Live larks recently taken—Prohibition against "killing or taking" larks in county of London—Possession of larks lawfully taken in another county **327**
See WILD BIRDS.

LEASE—Landlord and tenant.
See under LANDLORD AND TENANT.

LICENCE—Licensing Acts.
See under LICENSING ACTS.

—— Locomotive — Exemption — "Agricultural locomotive"—Hauling wheat to mill to be ground - - - - - **323**
See HIGHWAY.

LICENSING ACTS — *Bona fide Traveller — Closing Hours—Guest of Bona fide Traveller—Using Licensed Premises for Purpose of obtaining Liquor—Guest unlawfully on Licensed Premises —Licensing Act*, 1872 (35 *&* 36 *Vict. c.* 94), *s.* 25.

A bona fide traveller invited the appellant, who was not a bona fide traveller, to come with him into certain licensed premises as his guest for the purpose of getting something to drink at a time when the premises were required to be closed. When they went in the bona fide traveller ordered and paid for a glass of whisky for each of them. Upon an information charging the appellant, under s. 25 of the Licensing Act, 1872, with being unlawfully on the licensed premises at a time when the premises were required to be closed :—

Held, without expressing an opinion as to whether a bona fide traveller is entitled under any circumstances to order and pay for intoxicating liquor at licensed premises for consumption by another person as his guest, that, as the appellant went to the inn with the bona fide traveller for the sole purpose of getting intoxicating liquor, though the liquor was to be

LICENSING ACTS—*continued.*
ordered and paid for by the bona fide traveller, he was unlawfully on the premises and was liable to be convicted under s. 25 of the Act. JONES *v.* JONES - - - - **Div. Ct. 262**

2. —— *Costs—Practice — Refusal to renew Licence—Compensation—Appeal from Decision of Inland Revenue Commissioners—Discretion to order Payment of Costs by Commissioners—Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 1 ; *s.* 2, *sub-ss.* 2, 4—*Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 10, *sub-s.* 3.

Upon a successful appeal from a decision of the Inland Revenue Commissioners fixing the amount of compensation to be paid upon the refusal to renew a licence under the Licensing Act, 1904, s. 1, a judge of the High Court has a discretion to order the Commissioners to pay the appellant's costs ; but the mere fact that the appeal has succeeded to a substantial extent is not, per se, a sufficient ground for making such an order. *In re* HARDY'S CROWN BREWERY, LIMITED, AND ST. PHILIP'S TAVERN, MANCHESTER - - - - - - **C. A. 257**

3. —— *Renewal — "On" Licence — Ante-1869 Beer-house — Differentiation between redundant Houses belonging to different Owners—What Matters Compensation Authority may take into Consideration—Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23).

Where under the Licensing Act, 1904, the question of the renewal of two "on" licences of ante-1869 beer-houses belonging to different owners was referred to the compensation authority, and the compensation authority were satisfied that only one of them was required for the needs of the neighbourhood :—

Held by Farwell and Kennedy L.JJ. (Vaughan Williams L.J. dissenting), that for the purpose of differentiating between the two licensed houses and deciding which of the licences should be renewed the compensation authority were not entitled to take into consideration what other licences the owners of the respective licensed houses would be willing to surrender nor what contribution they would be willing to make to the compensation fund in consideration of the renewal of the licence in respect of which the application was made. THE KING *v.* SHANN **C. A. 418**

4. —— *Renewal of Licence — Refusal by Compensation Authority to renew—Payment of Compensation—Premises of less than requisite Statutory Value—Refusal to proceed with Assessment of Compensation — Refusal of Licensing Justices to grant further provisional Renewal of Licence—Beerhouse Act*, 1840 (3 *&* 4 *Vict. c.* 61), *s.* 1—*Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *ss.* 1, 2—*Licensing Rules*, 1904, *rr.* 31, 41, 42, 43.

The question of the renewal of an "on" beer licence, which had been continuously in force since a date before 1869, was referred by the licensing justices to the compensation authority, the ground of objection being that the licence was not required, and a provisional renewal was granted. The compensation authority refused the renewal, and upon the question coming

LICENSING ACTS—*continued.*
before the compensation authority whether they should approve the amount of compensation money agreed upon between the persons interested in the licensed premises it appeared that the annual value of the premises was less than that required by s. 1 of the Beerhouse Act, 1840. The compensation authority thereupon refused to approve the amount of compensation money agreed upon or to send the matter to be determined by the Commissioners of Inland Revenue. At the next general annual meeting the licensee applied for a further provisional renewal of the licence under r. 43 of the Licensing Rules, 1904, the compensation money not having been paid and not being likely to be paid before April 5 following, but the licensing justices, upon notice of objection duly given, refused to grant the renewal upon the ground that the annual value of the premises was less than that required by the Act :—

Held—(1.) that the compensation authority, having refused the renewal of the licence, were not entitled to entertain the question of the annual value of the premises, but were bound either to approve the amount of the compensation money agreed upon or to send the matter for determination to the Commissioners of Inland Revenue ; and (2.) that the licensing justices at the next general annual licensing meeting were not entitled to entertain the question of the annual value of the premises, but were bound under r. 43 of the Licensing Rules, 1904, inasmuch as the compensation money had not been paid and was not likely to be paid before April 5 following, to grant a further provisional renewal of the licence. THE KING *v.* WALSALL JUSTICES. THE KING *v.* WALSALL LICENSING JUSTICES - **Div. Ct. 210**

—— Manager of hotel—Undisclosed principal—Licence taken out in name of manager—Presumption as to hotel being tied **389**
See PRINCIPAL AND AGENT.

—— Poor rate—Public-house—Increased licence duty — "Any cause"— Mandamus to assessment committee to appoint valuer *See* RATES. 1. **859**

LICENSING RULES, 1904, rr. 31, 41, 42, 43
See LICENSING ACTS. 4. **210**

LIEN—Bill of lading—Lien for previously unsatisfied freight - - - - **813**
See COMPANY. 2.

—— Sale of goods — Unascertained goods — Delivery orders—Unpaid seller's lien—Assent to sub-sale - - - **502**
See SALE OF GOODS. 5.

LIMITATION OF ACTION—*Rent-charge—Personal Covenant to Pay—Remedy when barred—Civil Procedure Act*, 1833 (3 *&* 4 *Will.* 4, *c.* 42), *s.* 3—*Real Property Limitation Act*, 1874 (37 *&* 38 *Vict. c.* 57), *s.* 1.

The effect of s. 1 of the Real Property Limitation Act, 1874, upon s. 3 of the Civil Procedure Act, 1833, is to cut down the period within which a covenant to pay a rent-charge

LIMITATION OF ACTION—*continued.*
can be enforced, so that after the expiry of twelve years from the last payment without acknowledgment the remedy on the personal covenant is gone as well as the remedy against the land on which the money was charged. SHAW *v.* CROMPTON - - - **Div. Ct. 370**

LOCAL GOVERNMENT—*Chairman—Urban District Council—Retirement of Members—Election of New Members—Position of Former Chairman—Appointment of New Chairman—Inherent Right to Appoint—Chairman absent—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 199; *Sched. I., rr.* 3, 5—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *ss.* 23, 59.

By s. 199 of the Public Health Act, 1875, every urban authority (not being the council of a borough) is to hold an annual meeting, and meetings of local boards are to be held and conducted in accordance with the rules as to meetings and proceedings contained in Sched. I. to the Act. By r. 3 of those rules every local board shall at their annual meeting appoint one of their number to be chairman for one year at all meetings at which he is present. By r. 5, if the chairman is absent from any meeting, the members present shall appoint one of their number to act as chairman thereat.

By s. 59 of the Local Government Act, 1894, it is enacted that s. 199 and Sched. I. of the Public Health Act, 1875, shall apply in the case of every urban district council (other than a borough council) as if such district council were a local board. By s. 23, sub-s. 6, of the last-mentioned Act it is provided that a county council may in certain circumstances direct that the members of an urban district council shall retire together on April 15 in every third year, and that such order shall have full effect.

The members of an urban district council, in pursuance of an order so made by the county council, retired together on April 15, 1910. New members of the council were elected on April 4, 1910. Among the newly-elected councillors was one who had been on May 4, 1909, appointed chairman of the council composed of the retiring members. At the first meeting of the newly-elected members on April 19, 1910, this member claimed to act as chairman until a new chairman was appointed, on the ground that by r. 3 of the rules in Sched. I. to the Public Health Act, 1875, his appointment as chairman lasted for one year; and, acting as chairman, he gave a casting vote on the election of a new chairman to the council:—

Held, that the former chairman had no right as such to act as chairman at the meeting of the newly-appointed councillors on April 19, 1910; for that by the order of the county council the former members of the council, including their chairman, retired on April 15; and consequently that the new chairman was not validly appointed.

Held, also, that the proper course for the newly-elected councillors to adopt was to appoint one of their number to act as chairman for the first business of the meeting, including the appointment of a chairman for the year; and that this might be done either in pursuance

LOCAL GOVERNMENT—*continued.*
of the inherent right of a corporation to appoint one of their number to act as chairman, or under and by virtue of r. 5 of the rules in Sched. I. to the Public Health Act, 1875, on the ground that the chairman of the council was absent within the meaning of that rule. THE KING *v.* ROWLANDS. *Ex parte* BEESLEY **Div. Ct. 930**

2. —— *Costs of Unsuccessful Prosecutions — Borough having Separate Commission of the Peace—No Separate Court of Quarter Sessions —Prosecutions before Borough Justices—Justices Clerks Act*, 1877 (40 & 41 *Vict. c.* 43), *s.* 6—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 140; *Sched. V., Part II.*

A borough with a population exceeding 10,000 had a separate commission of the peace with a justices' clerk, but not a separate Court of quarter sessions. It had the right to provide and pay for its own police, but by agreement the borough was for police purposes consolidated with the county, and the county supplied the police for which the borough paid. The county rate was leviable in the borough:—

Held, that the costs of prosecutions undertaken by the police before the borough justices in cases in which such costs were not remitted or were not paid by the parties chargeable were chargeable to the borough fund and not to the funds of the county in which the borough was situate. GEORGE *v.* THOMAS - **Scrutton J. 951**

3. —— *Public Health — Offences — Sale of Unsound Meat—Seizure—Prosecution—Acquittal — Compensation for Damage from Exercise of Statutory Powers—Costs of defending Prosecution —Default of Claimant—Mens rea—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 116, 117, 308.

Where meat intended for human consumption is exposed for sale and is condemned as unsound, the person in whose possession or on whose premises the meat is found is liable to conviction under s. 117 of the Public Health Act, 1875, whether he is or is not aware of the unsoundness of the meat.

Accordingly, where a summons was taken out by a local authority under s. 117 against a butcher for selling for human consumption meat condemned as unsound but was dismissed, and the butcher claimed compensation under s. 308 against the local authority for damage sustained by him by reason of the exercise by the local authority of the powers of the Act, and, upon the matter being referred to arbitration, the umpire found that a small portion of the meat was unsound, but that the butcher and his assistants were unaware of the fact, and could not have discovered it by any examination which they could reasonably have been expected to make:—

Held, that the butcher sold the unsound meat at his peril, and that this was a matter as to which he was himself in default within s. 308, and, consequently, that he was not entitled to compensation.

Decision of Channell J., [1910] 2 K. B. 46, reversed. HOBBS *v.* WINCHESTER CORPORATION - - - - - - - **C. A. 471**

LOCAL GOVERNMENT—*continued.*

—— Municipal corporation—Borrowing powers —Obligation on corporation to mortgage rates by way of security for loan *See* CORPORATION. 201

LOCOMOTIVE—Licence—Exemption—"Agricultural locomotive"—Hauling wheat to mill to be ground - - - 323 *See* HIGHWAY.

LONDON — *Carcases of Dead Horses — Receiving—Licence—Public Yard—"Yard building or other premises" — London County Council (General Powers) Act*, 1903 (3 *Edw.* 7, *c. clxxxvii.*), *ss.* 53, 54.

By s. 53 of the London County Council (General Powers) Act, 1903, it is not lawful for any person to use any yard, building, or other premises within the county for receiving . . . . the carcases of dead horses unless he shall hold a licence from the council to use such yard, building, or other premises for that purpose. Any person contravening the provisions of this section is liable to a penalty:—

Held, that the words "yard building or other premises" mean yard, building, or other premises used by the accused as owner, occupier, or licensee, but do not include a public place to which he merely has access as one of the public and not otherwise. BAILEY *v.* LOWMAN Div. Ct. 39

—— Gaming — Street betting — Metropolitan Police Act, 1839 - - - - 1080 *See* BETTING.

—— Live larks recently taken - - - 327 *See* WILD BIRDS.

—— Poor rate — Public-house — Quinquennial valuation — Mandamus to assessment committee to appoint valuer - 859 *See* RATES. 1.

—— Water rate — Railway station — Sanitary conveniences — Metropolitan Water Board (Charges) Act, 1907 - - 890 *See* RATES. 2.

LUNACY—*Pauper Lunatic—Expenses of Maintenance—Reasonable Charges—Order of Justices —Lunacy Act*, 1890 (53 *Vict. c.* 5), *ss.* 283, 287.

On an application to justices for an order under s. 287 of the Lunacy Act, 1890, for the payment by the guardians of a poor law union of the reasonable charges of the expenses of maintenance of a pauper lunatic in an asylum, the justices have power to fix the amount of the payment to be made by the guardians; and in fixing that amount the justices are not restricted to the limit of 14*s.* a week imposed by s. 283.

Dictum of Wright J. in *Suffolk County Lunatic Asylum* v. *Stow Union*, (1897) 76 L. T. 494, explained. COMMITTEE OF VISITORS OF GLAMORGAN COUNTY ASYLUM *v.* CARDIFF GUARDIANS - - - - Div. Ct. 547

—— Poor law — Desertion—Separation order — Lunatic — Irremovability — Appeal to quarter sessions - - - - 16 *See* POOR LAW.

MAGISTRATES.
See under JUSTICES.

MALE SERVANT—"House porter" - 379 *See* REVENUE. 1.

MALICE—Execution creditor—Wrongful seizure —Debt paid before issue of writ—Absence of malice—Trespass - 244 *See* SHERIFF.

MANAGER — Hotel — Undisclosed principal — Licence taken out in name of manager —Presumption as to hotel being tied *See* PRINCIPAL AND AGENT. 389

MANCHESTER — Costs — Taxation — Non-contentious business — Jurisdiction — Proper officer—District Registrar of Manchester - - - - - 713 *See* PRACTICE. 2.

MANDAMUS—Board of Education—Decision—Want of jurisdiction—Certiorari - 165 *See* SCHOOLS. 3.

—— Poor rate — Public-house — Increased licence duty—Mandamus to assessment committee to appoint valuer - 859 *See* RATES. 1.

MAINTENANCE—Lunatic.
See under LUNACY.

MARINE INSURANCE.
See under INSURANCE (MARINE).

MARRIAGE SETTLEMENT.
See under SETTLEMENT.

MASTER AND SERVANT.
See under EMPLOYER AND WORKMAN.

MENS REA—Public health—Offences—Sale of unsound meat—Seizure—Prosecution—Acquittal—Compensation - - 471 *See* LOCAL GOVERNMENT. 3.

METROPOLIS.
See under LONDON.

METROPOLITAN POLICE ACT, 1839 - 1080 *See* BETTING.

METROPOLITAN WATER BOARD (CHARGES ACT), 1907 - - - - - 890 *See* RATES. 2.

MONEY-LENDER—*Carrying on Business elsewhere than at Registered Address—Collecting Repayment of Loans—Money-lenders Act*, 1900 (63 *& 64 Vict. c.* 51), *s.* 2, *sub-s.* 1 (*b*).

A money-lender who receives at a place which is not his registered address money in repayment of loans previously made does not thereby carry on business elsewhere than at his registered address within the meaning of s. 2, sub-s. 1, of the Money-lenders Act, 1900. HOPKINS *v.* HILLS - - - - Div. Ct. 29

2. —— *Registration—New Address — Places at which Business carried on—Particulars to be*

MONEY-LENDER—*continued.*

inserted in Form of Application—Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51), *ss.* 2, 3.

A registered money-lender, carrying on business at a registered address, who desires to be registered in respect of another and additional address, must in the form of application in respect of the latter address insert the name of the registered address at which he is already carrying on business as well as the address in respect of which he is applying for registration. STAFFORDSHIRE FINANCIAL COMPANY *v.* VALENTINE - - - - - - **C. A. 233**

MORTGAGE—Municipal corporation—Borrowing powers—Obligation on corporation to mortgage rates by way of security for loan - - - - - - **201**
See CORPORATION.

MOTION — Attachment — Solicitor — Costs — Taxation—Delivery of bill of costs—Default—Motion for attachment - **9**
See PRACTICE. 1.

MUNICIPAL CORPORATION.
See under CORPORATION.

MURDER — Indictment for — Conviction for attempt—Punishment - - - **124**
See CRIMINAL LAW. 2.

—— Workmen's compensation—Cashier—Risks incidental to the employment - **689**
See EMPLOYER AND WORKMAN. 1.

MUTUAL DEBTS—Assignment to defendant of debt owed by plaintiff to third person **643**
See SET-OFF.

NAME—Sale of poison—Label—"Name" of seller - - - - - - - **766**
See PHARMACY ACTS.

—— Trade name.
See under TRADE NAME.

NEGLIGENCE—Tramway, Lease of—Negligence by contractor in executing repairs—Accident to tramcar — Liability of contractor to lessee - - - **965**
See TRAMWAYS.

NERVOUS SHOCK—Neurasthenia—Workmen's compensation—Accident - - **538**
See EMPLOYER AND WORKMAN. 6.

NEURASTHENIA—Nervous shock—Workmen's compensation—Accident - - **538**
See EMPLOYER AND WORKMAN. 6.

NOTICE—Workmen's compensation—Notice of accident—Prejudice to employer - **677**
See EMPLOYER AND WORKMAN. 4.

OFFENCES—Sale of unsound meat—Seizure—Prosecution—Acquittal—Compensation—Costs of defending prosecution - **471**
See LOCAL GOVERNMENT. 3.

OFFENCES AGAINST THE PERSON ACT, 1861 - - - - - - - **124**
See CRIMINAL LAW. 2.

"OWNER"—Recovery of water rate from "owner"—Receiver of rents - **134**
See WATER.

PARTIES — Action, Parties to — Joinder of defendants — Relief claimed against several defendants in the alternative **354**
See PRACTICE. 3.

PATENT—Sale of goods—Contract—Warranty—Patent or trade name—Evidence **831**
See SALE OF GOODS. 1.

PAUPER LUNATIC.
See under LUNACY.

PHARMACY ACTS—*Sale of Poison — Label—"Name" of Seller—Pharmacy Act*, 1868 (31 & 32 *Vict. c.* 121), *s.* 17.

By s. 17 of the Pharmacy Act, 1868, "It shall be unlawful to sell any poison . . . . unless the . . . . bottle . . . . in which such poison is contained be distinctly labelled with the . . . . name and address of the seller of the poison . . . . and any person selling poison otherwise than is herein provided shall, upon a summary conviction . . . . be liable to a penalty . . . . "

A duly qualified chemist sold poison which was contained in a bottle labelled with his trade name but not with his personal name :—

Held, that the "name" of the seller mentioned in the section includes his trade name ; that there had therefore been a sufficient compliance with the section ; and that the chemist was not liable to the penalty imposed by it upon a person who sells poison contained in a bottle not labelled with the name of the seller. EDWARDS *v.* PHARMACEUTICAL SOCIETY OF GREAT BRITAIN - - - - **Div. Ct. 766**

PLEADINGS—Delivery of pleadings—Power of arbitrator to allow amendment of pleadings - - - - - - **738**
See ARBITRATION. 1.

POISON—Sale of—Label—"Name" of seller
See PHARMACY ACTS. **766**

POLICE—Street betting — Metropolitan Police Act, 1839.
See under BETTING.

POLICY—Insurance.
See under INSURANCE, INSURANCE (LIFE), and INSURANCE (MARINE).

POOR LAW — *Desertion — Separation Order — Lunatic — Irremovability — Appeal to Quarter Sessions—Poor Removal Act*, 1861 (24 & 25 *Vict. c.* 55), *s.* 3—*Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 294, 303.

On October 28, 1902, a married woman left her husband because he had contracted a venereal disease by misconduct with other women. On November 17, 1902, on a complaint by her that her husband had deserted her, a Court of summary jurisdiction granted a separation order under the Summary Jurisdiction (Married

POOR LAW—*continued.*
Women) Act, 1895. The wife never subsequently cohabited with her husband, and she resided in the district of the respondent union for more than a year previously to October 6, 1908, on which date she was sent to an asylum as a pauper lunatic :—

Held, that the husband had deserted his wife within the meaning of s. 3 of the Poor Removal Act, 1861; that the separation order did not put an end to the desertion; and that the wife was, therefore, irremovable from the respondent union.

Quære, whether the separation order was conclusive, or admissible, evidence of the fact of desertion.

Sects. 286 to 298 of the Lunacy Act, 1890, which provide that, where the settlement of a pauper lunatic can be ascertained, the expense of maintaining the lunatic shall be paid by the union in which the lunatic's settlement is, and, where that cannot be ascertained, by the union in which the lunatic has become chargeable, must be read subject to the exception in s. 294 that where a lunatic has become irremovable from a union the expenses shall be paid by that union and not by the union where the lunatic's settlement is, and, therefore, s. 303, which gives a right of appeal to quarter sessions against an order of justices adjudging the settlement of a lunatic, must be read as giving a similar right of appeal against an order adjudging that a lunatic has become irremovable. EASTBOURNE GUARDIANS *v.* CROYDON GUARDIANS
Div. Ct. 16

POOR RATE.
See under RATES.

PRACTICE — *Chancery Division — Solicitor — Costs—Taxation—Delivery of Bill of Costs—Default — Motion for Attachment—Order for Payment of Costs of Motion—Enforcement—Action in King's Bench Division—Rules of the Supreme Court, Order XLII., r. 24.*

An order was made by a judge in the Chancery Division that the defendant, a solicitor, should pay to the plaintiff the costs of a motion by the plaintiff for the attachment of the defendant for contempt of Court in not having delivered to the plaintiff a bill of costs pursuant to an order for taxation of costs. The costs of the motion having been taxed, the plaintiff sued the defendant in the King's Bench Division to recover the amount thereof :—

Held, that the action was maintainable. SELDON *v.* WILDE - - - **Darling J. 9**

2. —— *Costs — Taxation — Non-contentious Business—Jurisdiction—Proper Officer—District Registrar of Manchester—Solicitors Act*, 1843 (6 *&* 7 *Vict. c.* 73), *s.* 37—*Rules of the Supreme Court, Order XXXV., r.* 6A ; *Order LXI., r.* 1B ; *Order LXV., r.* 26A ; *Order LXXI., r.* 1.

Application having been made by originating summons in the Manchester District Registry for an order referring the bill of costs of a solicitor for non-contentious business to the district registrar for taxation :—

Held, that although an originating summons was the proper form in which to make the application and a judge of the King's Bench Division had power to refer the bill for taxation, yet the district registrar was not the "proper officer" to whom a bill for non-contentious business could be referred for taxation within s. 37 of the Solicitors Act, 1843, and that the bill must be taxed by a Master of the Supreme Court. *In re* STEAD - - - - - - - **C. A. 713**

3. —— *Parties to Action—Joinder of Defendants—Relief claimed against several Defendants in the Alternative—Joinder of different Causes of Action—Rules of the Supreme Court, Order XVI., rr.* 4, 7.

The power to join several defendants in the same action for the purpose of claiming relief against them severally or in the alternative under Order XVI., r. 4, is not confined to cases in which the causes of action alleged as against the several defendants are exactly identical, but extends to cases where the subject-matter of complaint as against the several defendants is substantially the same, although the causes of action as against them respectively are, technically, different in form, and the several liabilities alleged against them respectively are to some extent based on different grounds.

By a contract between H. Brothers & Co., who were the owners of a line of steamers, and the plaintiffs, who were exporters of frozen meat, carrying on business at Buenos Ayres, H. Brothers & Co. agreed to carry from the Argentine to Europe frozen meat to be shipped from time to time by the plaintiffs on certain named steamers belonging to H. Brothers & Co. or on other suitable steamers in addition to or substitution for the named steamers. It was subsequently agreed that frozen meat should be shipped by the plaintiffs on an additional steamer, procured by H. Brothers & Co., which was called the *Devon* and belonged to another company, for carriage from Bahia Blanca to England on the terms of the first-mentioned contract. This meat was accordingly shipped, and the master of the *Devon* signed bills of lading in respect of it. In an action brought by the plaintiffs in respect of damage to this meat alleged to have been caused by the unseaworthiness of the *Devon* the plaintiffs joined as defendants H. Brothers & Co. and the owners of the *Devon*, claiming against the former on the terms of the beforementioned contract and against the latter upon the bill of lading. :—

Held, that the defendants were rightly joined.

Smurthwaite v. *Hannay*, [1894] A. C. 494, and *Sadler* v. *Great Western Ry. Co.*, [1896] A. C. 450, discussed.

Frankenburg v. *Great Horseless Carriage Co.*, [1900] 1 Q. B. 504, and *Bullock* v. *London General Omnibus Co.*, [1907] 1 K. B. 264, followed. COMPANIA SANSINENA DE CARNES CONGELADAS *v.* HOULDER BROTHERS & CO., LIMITED - - - - - **C. A. 354**

4. —— *Representative Action — Action by Shippers of Goods on a General Ship on behalf of themselves and other Shippers of Goods in the same Ship—"Persons having the same interest in*

PRACTICE—*continued.*

one cause or matter"—Rules of the Supreme Court, Order XVI., r. 9.

The plaintiffs shipped goods on a general ship of the defendants for a voyage from New York to Japan. Before arriving at its destination the ship was sunk by a Russian cruiser on the ground that she was carrying contraband of war, and both ship and cargo were lost. In the writs in the present actions the plaintiffs were respectively described as suing "on behalf of themselves and others, owners of cargo lately laden on board the steamship *Knight Commander*," and the writs were indorsed with a claim for "damages for breach of contract and duty in and about the carriage of goods by sea." A letter written by the plaintiffs' solicitors to the defendants' solicitors on the day of the issue of the writs stated that plaintiffs were suing on behalf of themselves and forty-four other persons, firms, or companies (whose names were given) who had shipped goods on board the ship :—

Held, that, upon the writs as they stood, the plaintiffs and those whom they purported to represent were not "persons having the same interest in one cause or matter" within the meaning of Order XVI., r. 9, and that the plaintiffs were not entitled to bring representative actions.

Held, further, by Vaughan Williams L.J. and Fletcher Moulton L.J. (Buckley L.J., dissenting), that shippers of goods in a general ship could not have "the same interest in one cause or matter" within the meaning of that rule, and that the writs were incapable of being so amended as to enable the plaintiffs to maintain representative actions.

Held by Buckley L.J., that the writs should be amended by describing the plaintiffs as suing on behalf of themselves and all others the owners of cargo lately laden on board the steamship *Knight Commander*, not being shippers of goods which are contraband of war, and the indorsements amended by asking for a declaration that the defendants were liable to the plaintiffs and to those on whose behalf they sued for breach of contract $\frac{\text{and}}{\text{or}}$ duty in and about the carriage of goods by sea.

Per Fletcher Moulton L.J. : No representative action can lie where the sole relief sought is damages. MARKT & Co., LIMITED *v.* KNIGHT STEAMSHIP COMPANY, LIMITED. SALE & FRAZER *v.* KNIGHT STEAMSHIP COMPANY, LIMITED - - - - - - C. A. 1021

—— Amendment of pleadings, Power of arbitrator to allow - - - 738
See ARBITRATION. 1.

—— Service of notice of motion to set aside award on foreign company out of jurisdiction - - - - - 727
See ARBITRATION. 2.

—— Set-off.
See under SET-OFF.

PRESUMPTION — Knowledge of infancy — Betting circular — Circular sent to undergraduate - - - - - 118
See BETTING CIRCULAR.

PRINCIPAL AND AGENT—*Undisclosed Principal — Manager of Hotel — Licence taken out in Name of Manager — Presumption as to Hotel being tied—Liability of Owners for unauthorized Purchase of Spirits by Manager.*

The defendants, who were the owners of an hotel, appointed a manager of the hotel; the licence was taken out in the name of the manager, whose name also appeared over the door. The manager had been told by the defendants to order spirits from a certain brewery (with which the plaintiffs were in no way connected) and from no other place, but, in contravention of his instructions, the manager ordered whisky from the plaintiffs. The plaintiffs, who did not know that the defendants had prohibited the manager from buying spirits from any other place than the particular brewery, supplied the whisky to the manager at the hotel and gave credit to him only. Subsequently, upon discovering that the defendants were the real owners of the hotel, the plaintiffs sued them for the price of the whisky :—

Held, that the plaintiffs were entitled to maintain the action, inasmuch as there is no presumption, where a person deals with the licensee of an hotel and knows nothing of the real owner, that the licensee is a mere manager with limited authority and that the hotel is tied.

Where a person is the licensee of an hotel and is known to be the licensee, and nothing is brought to the attention of a seller to indicate to him that the position of the person with whom he is dealing is that of a mere manager of a tied house, the seller who trades with the licensee as a principal and afterwards discovers that he is an agent is entitled to sue the real principal when disclosed, notwithstanding any limitation placed by the principal on the authority of the licensee.

Watteau v. *Fenwick*, [1893] 1 Q. B. 346, followed.

Daun v. *Simmins*, (1879) 41 L. T. 783, distinguished. KINAHAN & Co. *v.* PARRY
Div. Ct. 389

—— Contract of fire insurance made by agent without authority — Ratification by principal after and with knowledge of loss by fire—Whether ratification valid in law - - - - - - 401
See INSURANCE (FIRE).

PRINCIPAL AND SURETY — Bankruptcy — Fidelity bond — Surety — Default of trustee — Penal interest — Liability of surety - - - - - - 649
See BANKRUPTCY. 5.

PROFITS—Damages — Remoteness — Breach of contract—Contingent profits - 486
See DAMAGE.

PROMOTERS—Lands Clauses Acts—Arbitration — Costs — Offer by promoters — Conditional offer - - - - - 252
See LANDS CLAUSES ACTS.

PROOF—Onus of—Workmen's compensation—Jurisdiction of arbitrator — Award terminating at a future date—Prospective order - - - - - - 673
See EMPLOYER AND WORKMAN. 7.

PROSECUTION—Costs of unsuccessful prosecutions — Prosecutions before borough justices—Justices Clerks Act, 1877
See LOCAL GOVERNMENT. 2. 951

PROTECTORATE — Habeas corpus — Foreign country in which the Crown has jurisdiction - - - - - - 576
See HABEAS CORPUS. 2.

PUBLIC HEALTH—Chairman—Retirement of members—Election of new members—Position of former chairman - 930
See LOCAL GOVERNMENT. 1.

—— Municipal corporation—Borrowing powers
See CORPORATION. 201

—— Offences—Sale of unsound meat—Seizure—Prosecution—Acquittal — Compensation - - - - - - - 471
See LOCAL GOVERNMENT. 3.

PUBLIC-HOUSE.
See under LICENSING ACTS.

PURCHASE — Distress — Protected goods — "Goods comprised in hire purchase agreement"—Reputed ownership 84
See LANDLORD AND TENANT. 1.

QUARTER SESSIONS—No separate Court of—Costs of unsuccessful prosecutions — Borough having separate commission of the peace - - - - - - 951
See LOCAL GOVERNMENT. 2.

—— Poor law—Desertion—Separation order—Lunatic — Irremovability — Appeal to quarter sessions - - - - 16
See POOR LAW.

RAILWAY — *Rates — Reasonable Facilities — Agreed Through Rates— Application for Through Rates of same Amount but differently apportioned —Jurisdiction of Railway Commissioners—Railway and Canal Traffic Act*, 1888 (51 *&* 52 *Vict. c.* 25), *s.* 25.

The Railway and Canal Commissioners have no jurisdiction under s. 25 of the Railway and Canal Traffic Act, 1888, to entertain an application for a new apportionment between the several railway companies over whose lines through traffic is carried of an existing through rate for that traffic.

Where an agreed through rate for through traffic over the lines of two or more railway companies is in existence, and the apportionment of the rate between the railway companies has been agreed upon, and there is no threat on the part of any of the companies to withdraw the rate, the Railway and Canal Commissioners have no jurisdiction to entertain an application for an order for a through rate of the same amount as the existing rate but differently apportioned between the several railway companies. MANCHESTER SHIP CANAL COMPNAY *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY - **Railway and Canal Commission 913**

RAILWAY—*continued.*
—— Water rate — Railway station — Sanitary conveniences - - - - - 890
See RATES. 2.

RATES — *Public-house — Quinquennial Valuation — Provisional List — Reduction of Value —Increased Licence Duty — "Any cause"— Mandamus to Assessment Committee to appoint Valuer — Poor Rate — Metropolis — Valuation (Metropolis) Act*, 1869 (32 *&* 33 *Vict. c.* 67), *s.* 47 *—Finance* (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 43, 44 ; *Sched. I., C.*

The heavy increase in the duty imposed by the Finance (1900–10) Act, 1910, upon licensed premises in the metropolis :—

Held to be prima facie evidence of a reduction in value within s. 47 of the Valuation (Metropolis) Act, 1869, so as to entitle the tenant, if default is made by the overseers in sending a provisional list to the assessment committee pursuant to sub-s. 1, to require the assessment committee to appoint a person to make such a list pursuant to sub-s. 2 of that section. THE KING *v.* SHOREDITCH ASSESSMENT COMMITTEE. *Ex parte* MORGAN **C. A. 859**

2. —— *Water Rate — Domestic Purposes— Railway Purposes—Railway Station—Sanitary Conveniences — Metropolitan Water Board (Charges) Act*, 1907 (7 *Edw.* 7, *c. clxxi.*), *ss.* 8, 16, 25.

The Metropolitan Water Board (Charges) Act, 1907, provides by s. 8 for a supply of water for "domestic purposes" at the request of the owner or occupier of any house or building occupied as a separate tenement within the limits of supply of the Metropolitan Water Board at a rate based on the rateable value of the house or building. The same Act by s. 16 provides for a supply of water by measure for "purposes other than domestic" at the request of any owner or occupier of any premises situate as therein described at rates varying with the quantity supplied. By s. 25 "domestic purposes" are deemed to include water closets and baths of a certain capacity, but are not to include a supply of water for "railway purposes."

A railway company owned a station situate as described in s. 16 and within the limits of supply of the Board. The station was separately rated ; it contained no stationmaster's house, but contained waiting rooms, a porter's room, and a booking office ; on the up and down platforms were urinals and two water closets, one for passengers and one for the staff ; there was also on each platform a tap from which water was drawn for drinking and for cleansing the platform :—

Held, that the water supplied by the Board for these purposes was supplied for "railway purposes" within s. 25 and was therefore supplied for "purposes other than domestic" within s. 16.

Decision of Divisional Court (Phillimore and Bucknill JJ.), [1910] 1 K. B. 804, affirmed. METROPOLITAN WATER BOARD *v.* LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY - - - - - - - **C. A. 890**

RATES—*continued.*

—— Municipal corporation—Borrowing powers —Obligation on corporation to mortgage rates by way of security for loan **201**
See CORPORATION.

—— Railway — Reasonable facilities — Agreed through rates—Railway Commissioners, Jurisdiction of - - - - **913**
See RAILWAY.

—— Recovery of water rate from "owner"—Receiver of rents - - - **134**
See WATER.

RATIFICATION — Contract of fire insurance made by agent without authority—Ratification by principal after and with knowledge of loss by fire—Whether ratification valid in law - - **401**
See INSURANCE (FIRE).

REAL PROPERTY LIMITATION ACT, 1874
See LIMITATION OF ACTION. **370**

RECEIVER—Company—Receiver and manager, Powers of — Shipment of goods by receiver — Bill of lading — Lien for previously unsatisfied freight - **813**
See COMPANY. 2.

—— Company — Winding-up — Jurisdiction to order official receiver to pay costs personally - - - - - **697**
See COMPANY. 4.

—— Water rate from "owner," Recovery of—Receiver of rents - - - - **134**
See WATER.

RE-ENTRY—Proviso for re-entry for breaches of covenant—Breach of covenant not to underlet—Surrender of lease—Acceptance of, by lessor in ignorance of underlease - - - - - **32**
See LANDLORD AND TENANT. 2.

REGISTRATION—Money-lenders.
See under MONEY-LENDER.

REMOTENESS—Damages—Breach of contract—Contingent profits - - - **486**
See DAMAGES.

RENT—Action for—Defence, no concluded agreement—Second action—Defence, Statute of Frauds—Res judicata - - **531**
See ESTOPPEL.

—— Assignment by lessee of part of premises —Apportionment of rent — Value of severed parts - - - - - **155**
See LANDLORD AND TENANT. 3.

RENT-CHARGE — Personal covenant to pay—Remedy when barred - - - **370**
See LIMITATION OF ACTION.

REPAIRS—Tramway, Lease of—Negligence by contractor in executing repairs—Accident to tramcar—Liability of contractor to lessee - - - - - **965**
See TRAMWAYS.

REPRESENTATIVE ACTION — Action by shippers of goods on a general ship on behalf of themselves and other shippers of goods in the same ship - - **1021**
See PRACTICE. 4.

REPUTED OWNERSHIP — Distress—Protected goods - - - - - - - **84**
See LANDLORD AND TENANT. 1.

RES JUDICATA — Habeas corpus — Appeal — Estoppel by judgment — Absence of adjudication as of record - - **1056**
See HABEAS CORPUS. 1.

—— Lease, Agreement for—Action for rent—Defence, no concluded agreement — Second action — Defence, Statute of Frauds - - - - - **531**
See ESTOPPEL.

REVENUE—*Male Servant—"House Porter"—Porter Employee at Block of Flats—Employment in Trade or Business—Revenue Act*, 1869 (32 & 33 *Vict. c.* 14), *ss.* 18, 19.

A male servant was employed as porter at a block of residential flats, which were let to different tenants. His duties were to attend, work, and clean the lifts, to keep the brasswork, staircases, front steps, and back yards clean, to take coals to the various flats, to bring down the dustbins by means of trade lifts from each flat, to attend in the hall and open the doors when necessary, and to call cabs or fetch carriages and carry luggage for the tenants :—

Held, that the servant was a house porter and therefore a "male servant" within the definition of that term in s. 19, sub-s. 3, of the Revenue Act, 1869, and that therefore his employer was liable to pay the duty imposed in respect of him by s. 18 of the Act.

There is no general exemption from duty contained in the Revenue Act, 1869, in respect of a male servant employed for the purposes of a trade or business.

Whiteley v. *Burns*, [1908] 1 K. B. 705, considered. MARCHANT *v.* LONDON COUNTY COUNCIL - - - - - **Div. Ct. 379**

2. —— *Income Tax—Profits of Trade, Manufacture, &c.—Average of Three Years preceding Year of Assessment—Trade first set up within Period of Three Years—Single Ship Company—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100 ; *Sched. D, Case* 1, *r.* 1.

By s. 100 of the Income Tax Act, 1842, and by case 1, r. 1, in Sched. D of that Act, duty to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule of the Act, is to be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern upon a fair and just average of three years, ending on such day of the year immediately preceding the year of assessment on which the accounts of the said trade, manufacture, adventure, or concern are usually made up, or on the 5th day of April preceding the year of assessment ; provided always, that in cases where the trade, manufacture, adventure, or concern has

REVENUE—*continued.*

been set up and commenced within the said period of three years, the computation is to be made for one year on the average of the balance of the profits and gains from the period of first setting up the same.

A limited company registered under the Companies Acts, 1862 to 1900, was formed to purchase and trade with a certain steamship mentioned in the memorandum of association and, in the event of the loss, sale, or disposition of that vessel or of any vessel subsequently acquired, to acquire from time to time some other steamship, but so that the company should not own at any one time more than one ship; and the company was to carry on the business of shipowners with respect to such steamship. The articles of association provided that there should be a manager of the company in lieu of directors; that the manager might insure the steamship for the time being owned by the company; and that he might in the event of the loss of the steamship for the time being owned by the company, with the approval of the shareholders, buy another steamship out of the proceeds of the insurances of the ship so lost, or he was to divide and pay the net proceeds of the insurances rateably amongst the shareholders and wind up the company.

The company acquired the steamship mentioned in the memorandum of association and traded with her from 1901 till April 1, 1906, when she was lost at sea. In May, 1906, the manager of the company, with the approval of the shareholders, purchased a second steamship out of the proceeds of the insurances on the first. On October 17, 1906, the company commenced trading with the second steamship:—

Held, that the company carried on one trade or adventure throughout with the two ships in succession, and that the trade or adventure which they carried on with the second ship was not first set up on October 17, 1906, when that ship began trading:—

Therefore, for the purpose of assessment to income tax for the year 1907–8:—

Held, that the company were to be assessed on the balance of their profits and gains on an average of three years preceding the year of assessment, and not for one year on the average of the balance of the profits and gains from October 17, 1906. MERCHISTON STEAMSHIP COMPANY *v.* TURNER - - - **Bray J. 923**

3. —— *Writ of Extent—Practice—Affidavit of Debt and Danger—Sufficiency of Affidavit—Motion to set aside Writ.*

A writ of extent was issued upon an affidavit of debt and danger in which the deponent stated the fact that a debt was due to the Crown from a certain debtor and the nature and origin of the debt, and proceeded to allege that from inquiries he had made he had ascertained and believed that the debt due to the Crown from the debtor would be lost unless some more speedy course than the ordinary method of proceeding were forthwith had and taken to recover the same on behalf of His Majesty.

On motion to set aside the writ:—

Held, that the affidavit was defective in that

REVENUE—*continued.*

it omitted to state the facts from which the Court might infer that the debt was in danger of being lost.

The writ was accordingly set aside. THE KING *v.* PRIDGEON - - - **Bray J. 543**

—— Costs—Licensing Acts—Appeal from decision of Inland Revenue Commissioners—Discretion to order payment of costs by Commissioners - - - **257**
See LICENSING ACTS. 2.

RULES OF THE SUPREME COURT, Order XVI. (Parties), rr. 4, 7 - - - - **354**
See PRACTICE. 3.

—— **r. 9** - - - - - - - - **1021**
See PRACTICE. 4.

—— **Order XLII. (Execution), r. 24** - - **9**
See PRACTICE. 1.

—— **Order LIX. (Divisional Courts), r. 14** - **161**
See COUNTY COURT. 1.

SALE—Poison—"Name" of seller - **766**
See PHARMACY ACTS.

SALE OF GOODS — *Contract — Warranty — Implied Condition as to Fitness — Merchantable Quality — Patent or Trade Name — Evidence — Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 14, *sub-ss.* 1 *and* 2.

Under a contract in writing which contained no mention of the particular purpose for which they were required, the plaintiffs bought "the 24/40 h.p. Fiat omnibus" they had inspected and "six 24/40 h.p. Fiat omnibus chassis" at an agreed price. The articles when delivered were not fit to perform the work required of them. In an action for damages:—

Held, that this was not a contract for the sale of a specified article under its patent or trade name, and that there was an implied condition that the goods should be reasonably fit for the purpose for which they were required within s. 14, sub-s. 1, of the Sale of Goods Act, 1893, and also that they should be of merchantable quality within sub-s. 2 of the same section, and consequently that the plaintiffs were entitled to recover damages for breach of the contract.

Per Farwell L.J.: No evidence of any antecedent or subsequent negotiations to prove express warranty was admissible in such a contract.

The proviso at the end of sub-s. 1 of s. 14 assumes the absence of any express assurance by the seller and deals only with the case of express or implied information by the buyer of the purpose for which he requires the article, so framed as to shew that he relied on the seller's skill or judgment, but the seller is not bound to refrain from carrying out his order for a particular article because it is ill adapted for the purpose mentioned in the order, provided the article has in fact a patent or trade name under which it can be ordered.

The condition implied by sub-s. 2 of s. 14 that the goods are of merchantable quality applies to all goods bought from the seller who deals in

SALE OF GOODS—*continued.*

goods of that description whether they are sold under a patent or trade name or otherwise. BRISTOL TRAMWAYS, &C., CARRIAGE COMPANY, LIMITED *v.* FIAT MOTORS, LIMITED - **C. A. 831**

2. —— *Contract not to be performed within a Year—Writing signed by the Party to be charged—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 4—*Sale of Goods Act*, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 4.

Sect. 4 of the Statute of Frauds (so far as it relates to agreements not to be performed within a year) applies to agreements for the sale of goods, and is not repealed by the Sale of Goods Act, 1893. Therefore an agreement for the sale of goods is not taken out of the operation of the above provision of the Statute of Frauds by reason of there having been acceptance and actual receipt by the buyer of part of the goods so sold. PRESTED MINERS COMPANY, LIMITED *v.* GARNER, LIMITED - - **Walton J. 776**

3. —— *Delivery of Goods not of Contract Description—Resale by Purchaser—Condition—Warranty—Exclusion by Terms of Contract of Liability for Breach of Warranty.*

The defendants sold seed by sample to the plaintiffs, the terms of the sale as expressed in the sold note being that they sold on the conditions printed on the back of the note about 27½ quarters common English sainfoin at forty shillings. The material condition on the back of the sale note ran: "Sellers give no warranty express or implied as to growth, description, or any other matters . . . ." Seed equal to sample was delivered under the contract, and a portion of it was resold by the plaintiffs as common English sainfoin. The seed delivered was not, nor was the sample, common English sainfoin; they were both the seed of giant sainfoin, which was of inferior quality to that contracted for. The difference between the two seeds was indistinguishable, and the mistake was only discovered by the plaintiffs' sub-purchaser when the seed sown by him came up. The plaintiffs reasonably and properly settled a claim for damages brought against them by their sub-purchaser, and now claimed to recover from the defendants the amount so paid:—

Held by Vaughan Williams L.J. and Farwell L.J. (Fletcher Moulton L.J. dissenting), that the plaintiffs, having accepted and resold the seed, had put it out of their power to treat the description of the article sold as common English sainfoin as a condition, on a breach of which they were entitled to reject the goods, and could only treat it as a warranty, a breach of which would ordinarily entitle the purchaser to damages; but that upon the true construction of the condition printed on the back of the sold note the defendants had excluded all liability capable of enforcement by an action for breach of warranty.

Howcroft v. *Laycock*, (1898) 14 Times L. R. 460, overruled. WALLIS, SON & WELLS *v.* PRATT & HAYNES - - - - **C. A. 1003**

4. —— *Implied Condition as to Quality or Fitness — Merchantable Quality — Right of Rejection — Form of Contract — Severability —*

SALE OF GOODS—*continued.*

Rejection of later Instalments after Acceptance of earlier Instalment—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 14.

An English dealer ordered from a foreign manufacturer a large number of motor horns of different descriptions and prices, "delivery as required." The horns were delivered in several instalments. The buyer, after accepting the first instalment, rejected the later instalments on the ground that the goods were not of merchantable quality. In an action for the price of the goods the official referee found that a large proportion of the horns were dented and badly polished owing to defective packing and careless workmanship, but that they could easily have been made merchantable at a trifling cost, and he declined to hold that the consignment as a whole was unmerchantable and gave judgment for the seller with an allowance to the buyer in respect of the defective goods; and this judgment was affirmed by the Divisional Court. On appeal:—

Held, (1.) upon the construction of the contract, that the acceptance of the first instalment did not preclude the buyer from rejecting the later instalments; (2.) that the buyer was justified in rejecting the later instalments as unmerchantable. JACKSON *v.* ROTAX MOTOR AND CYCLE COMPANY - - - **C. A. 937**

5. —— *Unascertained Goods — Delivery Orders — Unpaid Seller's Lien — Assent to Sub-sale—Sale of Goods Act*, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 47.

By s. 47 of the Sale of Goods Act, 1893, it is declared that the unpaid seller's right of lien or retention or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto:—

Held, that the mere assent of an unpaid seller to a sale by the buyer of an unascertained portion of the goods is not such an assent as is contemplated by the above section as affecting the unpaid seller's right of lien. To affect the lien the assent must be given in such circumstances as to shew an intention on the part of the unpaid seller to renounce his right against the goods sold by the buyer.

The defendants sold oil to certain merchants. The merchants sold a portion of this oil to the plaintiffs, giving them delivery orders addressed to the defendants and directing the latter to deliver to the plaintiffs or their order "ex our contract." The plaintiffs presented these orders to the defendants, who either sent word that they were in order, or retained them without comment, and in either case entered in their books the names of the plaintiffs. While the merchants were punctual in their payments to the defendants the latter regularly delivered oil on these orders to the plaintiffs or their sub-purchasers. The merchants fell into arrear with their payments, and the defendants, claiming to exercise their right of lien as unpaid sellers, refused to make any further deliveries against the merchants' delivery orders.

In an action by the plaintiffs against the defendants:—

SALE OF GOODS—*continued.*

Held, that the defendants had not assented to the sales by the merchants to the plaintiffs so as to preclude them from exercising their right of lien as unpaid sellers.

Stoveld v. *Hughes*, (1811) 14 East, 308, and *Pearson* v. *Dawson*, (1858) E. B. & E. 448, distinguished. MORDAUNT BROTHERS *v.* BRITISH OIL AND CAKE MILLS, LIMITED Pickford J. **502**

SANITARY CONVENIENCES — Water rate—Railway station — Domestic purposes *See* RATES. 2. **890**

SCHOOLS—*Blind or Deaf Child—Child boarded out and educated by Education Authority—Child without Means of Support—Recovery of Expenses from "Parent"—Liability of Guardians of Union—Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75), *s.* 3—*Elementary Education (Blind and Deaf Children) Act*, 1893 (56 & 57 *Vict. c.* 42), *ss.* 2, 9.

By s. 2, sub-s. 1, of the Elementary Education (Blind and Deaf Children) Act, 1893, it is the duty of every education authority to enable blind and deaf children resident in their district, for whose elementary education efficient and suitable provision is not otherwise made, to obtain such education in some school certified as suitable for providing such education, and for that purpose, where necessary or expedient, to make arrangements for boarding out any blind or deaf child in a home conveniently near to the certified school where the child is receiving elementary education. By s. 9, sub-s. 1, where an education authority incur any expense under this Act in respect of any blind or deaf child, "the parent of the child shall be liable to contribute towards the expenses of the child such weekly sum" as may be agreed on or settled by a Court of summary jurisdiction. By s. 15, the expression "expenses" includes the expenses of and incidental to the attendance of the child at school and the maintenance and boarding out of the child while so attending school; and other expressions have the same meaning as in the Elementary Education Acts.

By s. 3 of the Elementary Education Act, 1870, the term "parent" includes guardian and every person who is liable to maintain or has the actual custody of any child.

A deaf child was boarded out and educated by the education authority at a certified school, and the father agreed to contribute 1*s.* a week towards the expenses. The father died leaving the child without any means of support, and there was no relation who was legally liable to maintain the child. The child's place of settlement was in Southwark. The education authority claimed that the guardians of the Southwark Union were liable, under s. 9, sub-s. 1, of the Elementary Education (Blind and Deaf Children) Act, 1893, to contribute towards the expenses of the maintenance and education of the child since the death of the father, as being "liable to maintain" the child and therefore the "parent" within the meaning of the section, inasmuch as, if the child became chargeable, they would be bound to support him:—

SCHOOLS—*continued.*

Held, that the fact that, if the child became chargeable, the guardians of the union would be bound to support him did not make them "liable to maintain" him, and that therefore they were not the "parent" of the child within the meaning of the section and were not liable to contribute towards the expenses. SOUTHWARK UNION *v.* LONDON COUNTY COUNCIL **Div. Ct. 559**

2. —— *Education — Non-compliance with Attendance Order — Reasonable Excuse—Provision of efficient Elementary Instruction—Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75), *s.* 74—*Elementary Education Act*, 1876 (39 & 40 *Vict. c.* 79), *ss.* 11, 12, 48.

Sect. 11 of the Elementary Education Act, 1876, provides that, if a parent of a child above the age of five years who is under the Act prohibited from being taken into full time employment habitually and "without reasonable excuse" neglects to provide efficient elementary instruction for the child, a Court of summary jurisdiction may make an attendance order (i.e., an order that the child attend a certified efficient school). The section further provides that "any of the following reasons shall be a reasonable excuse": (1.) that there is not within two miles from the child's residence any public elementary school open which the child can attend, or (2.) that the absence of the child from school has been caused by sickness or any unavoidable cause.

By s. 12, if the attendance order is not complied with, "without any reasonable excuse within the meaning of this Act," a Court of summary jurisdiction may inflict a penalty on the parent.

By s. 48, "Terms in this Act shall, so far as is consistent with the tenor thereof, have the same meaning as in the Elementary Education Acts, 1870 and 1873."

By s. 74 of the Elementary Education Act, 1870, the following reason, amongst others, shall be a reasonable excuse, namely, "that the child is under efficient instruction in some other manner":—

Held, that at the hearing of a summons taken out under s. 12 of the Act of 1876 for non-compliance with an attendance order the parent is entitled to call witnesses for the purpose of shewing that he is providing efficient elementary instruction for the child at home, inasmuch as the meaning of the expression "reasonable excuse" in s. 12 of the Act of 1876 is not confined to the two reasons mentioned in s. 11 of that Act as being a reasonable excuse, but includes the reason mentioned in s. 74 of the Act of 1870, namely, that the child is under efficient instruction in some other manner. THE KING *v.* WEST RIDING OF YORKSHIRE JUSTICES. *Ex parte* BROADBENT - - - - - **Div. Ct. 192**

3. —— *Education — Public Elementary School — Teachers — Salaries — Provided and Non-provided Schools—Local Education Authority—Right to discriminate—Failure to maintain and keep efficient—Board of Education—Decision—Want of Jurisdiction—Certiorari—Mandamus—Education Act*, 1902 (2 *Edw.* 7, *c.* 42), *s.* 7.

A local education authority has no power

SCHOOLS—*continued.*
under the Education Act, 1902, to differentiate, in the matter of teachers equally qualified and teaching the same subjects, between the salaries paid in provided and non-provided schools as such.

On the coming into force of the Education Act, 1902, the local education authority of Swansea continued to pay salaries to the teachers in the schools in the district at the rates previously in existence, the salaries paid to teachers in provided schools being at a higher rate than those paid to teachers of similar qualifications in non-provided schools. Subsequently an increase was made in the salaries paid to teachers in the provided schools only, and the managers of a non-provided school in the district complained to the Board of Education that the local education authority, by refusing to pay salaries in the non-provided school at the same rate as in the provided schools, had failed to maintain and keep efficient the non-provided school, as provided by s. 7 of the Education Act, 1902. The Board appointed a barrister to hold an inquiry, and, after hearing evidence on behalf of the managers, he reported that the school had regularly earned the grant, but only through the deficiency in salaries having been made good by the managers, and that the local education authority had failed to maintain and keep efficient the school. The Board of Education decided that there had been no such failure by the local education authority, on the grounds that there was no statutory right on the part of the managers of any particular school to receive any particular scale of salaries, and that it had not been shewn that the money provided by the local education authority was inadequate for the purpose of maintaining and keeping efficient the school in question :—

Held, that the decision of the Board of Education must be quashed on the ground that it did not answer the question submitted to them and that a mandamus must be issued directing the Board to determine the question according to law.

Decision of the Divisional Court, [1909] 2 K. B. 1045, affirmed. THE KING *v.* BOARD OF EDUCATION - - - - - **C. A. 165**

SEAMAN—Workmen's compensation — Seaman returning to ship - - - - - **555**
See EMPLOYER AND WORKMAN. 8.

SEARCH—Water bailiff—Powers of—Right to search suspected person's pocket - **320**
See FISHERY ACTS.

SECRETARY OF STATE FOR COLONIES—Protectorate—"Foreign dominion of the Crown" - - - - - - - **576**
See HABEAS CORPUS. 2.

SEPARATION ORDER—Desertion—Lunatic—Irremovability — Appeal to quarter sessions - - - - - - - **16**
See POOR LAW.

SERVANT—Male servant—"House porter"—Porter employed at block of flats - **379**
See REVENUE. 1.

SERVANT—*continued.*
—— Master and servant
See under EMPLOYER AND WORKMAN.

SERVICE—Practice—Service of notice of motion to set aside award on foreign company out of jurisdiction - - - - **727**
See ARBITRATION. 2.

SET-OFF—*Mutual Debts—Assignment to Defendant of Debt owed by Plaintiff to Third Person—Set-off by Defendant of assigned Debt against Plaintiff's Claim — Practice — Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.

In an action to recover a debt due from the defendant to the plaintiff, the defendant is entitled to set off a debt originally due from the plaintiff to a third person who has assigned it to the defendant.

Decision of the Divisional Court, [1910] 2 K. B. 1, reversed. BENNETT *v.* WHITE
C. A. 643

—— Dispute between employer and workman—Set-off of employer's claim for damages against workman's wages - - **445**
See EMPLOYER AND WORKMAN. 11.

SETTING ASIDE—Judgment—Action by bankrupt to set aside judgment on ground of fraud—Jurisdiction - - - **229**
See BANKRUPTCY. 4.

—— Writ of extent—Affidavit of debt and danger—Sufficiency of affidavit—Motion to set aside writ - - - - **543**
See REVENUE. 3.

SETTLEMENT—Covenant by husband to settle after-acquired furniture — Furniture afterwards bought and used at family residence — Bankruptcy of husband
See BANKRUPTCY. 3. **1049**

SEWER GAS—Disease—Workmen's compensation—Notice of accident—Prejudice to employer - - - - - - **677**
See EMPLOYER AND WORKMAN. 4.

SHERIFF — *Execution Creditor — Wrongful Seizure—Indorsement on Writ of Fi. Fa.—Debt paid before Issue of Writ—Absence of Malice —Trespass.*

A solicitor, who had an office in London with a branch office in the country, sued out in London a writ of fi. fa. upon an order for costs made in favour of his client against the plaintiff in the High Court, and indorsed the writ, in accordance with Order XLII., r. 16, of the Rules of the Supreme Court, with a direction to the sheriff to levy the amount of the debt. The debt had in fact been paid at the solicitor's country office, to a clerk having authority to receive it, on the same day as, and about three hours before, the writ of fi. fa. was sued out. Neither the solicitor nor his client knew of the payment of the debt. Execution having been levied on the plaintiff's goods, the solicitor was then informed that the debt had been paid, and he withdrew the execution. In an action against the solicitor and his client on the case to recover damages for improperly levying execution, and

SHERIFF—*continued.*
in the alternative for trespass, it was found that neither the client nor the solicitor who sued out the writ acted maliciously :—

Held, that the defendants were liable in trespass, though in the absence of malice they were not liable in an action on the case.

Decision of the Divisional Court, [1910] 1 K. B. 374, reversed. CLISSOLD *v.* CRATCHLEY **C. A. 244**

SHIPPING—*Charterparty—Demurrage Clause—No Time specified for Demurrage—Rights of Parties.*

Where a charterparty provides that if the ship is detained after the expiry of the time limited for loading demurrage shall be paid at a specified rate, but no time is thereby specified during which she may be kept on demurrage, the ship is not entitled to sail with an incomplete cargo immediately upon the expiry of the loading time, but the charterer is entitled to keep her on demurrage for a reasonable time.

Query whether, if there is no demurrage clause at all, the charterer is entitled to detain the ship for a reasonable time at a reasonable rate of compensation? WILSON & COVENTRY, LIMITED *v.* OTTO THORESEN'S LINIE - - - - - - - **Bray J. 405**

2. —— *Charterparty—Non-arrival by fixed Date—Date for Exercise of Option to cancel Charterparty.*

The plaintiffs chartered to the defendants a ship which was to go with all convenient speed to Newcastle, New South Wales, and there load a cargo of coals which the freighters bound themselves to ship. The defendants had the option to cancel the charterparty if the ship had not arrived ready to load at Newcastle by December 15, 1907. The ship was detained and did not arrive at Newcastle till June 15, 1908, whereupon the charterers cancelled the charterparty. Meanwhile the plaintiffs had called upon the defendants to exercise as soon as December 15 had passed their option to cancel. The defendants refused to do so, and the plaintiffs brought this action for damages for breach of contract on the ground that the defendants ought to have exercised their option as soon as December 15, 1907, had passed and they had been called upon to do so, or within a reasonable time afterwards ; and that inasmuch as they had declined to elect within a reasonable time from that date the option was gone :—

Held by Bray J. and by the Court of Appeal, that the owners were bound to send the ship to Newcastle ; that there was nothing to shew that the charterers were not to have the full benefit of that obligation because the ship could not get there by the named date ; and that the charterers could not be called upon to exercise their option to cancel the contract until the ship had arrived at Newcastle. MOEL TRYVAN SHIP COMPANY, LIMITED *v.* ANDREW WEIR & CO. **C. A. 844**

3. —— *Putting into Port of Refuge—Necessity of, caused by Unseaworthiness—Deviation—Effect of, on Contract of Carriage—*

SHIPPING—*continued.*
Lien for "Dead Freight"—Unliquidated Damages for Short Loading.

Where in the course of a voyage it becomes necessary for the safety of the ship and cargo to put into a port of refuge, a deviation for that purpose is justifiable and proper, none the less because the necessity for it was caused by the shipowner's wrongful act in sending the ship to sea in an unseaworthy condition, and it consequently has not the effect of putting an end to the contract of carriage or of relieving the cargo owners from the obligations which the contract contains.

Where by a charterparty or bill of lading a lien is given to the shipowner for "dead freight," that expression must be taken to include unliquidated damages for a breach of contract by the charterer in failing to load a full and complete cargo.

McLean v. *Fleming*, (1871) L. R. 2 H. L. Sc. 128, followed.

Gray v. *Carr*, (1871) L. R. 6 Q. B. 522, not followed. KISH *v.* TAYLOR - **Walton J. 309**

—— Bill of lading—Lien for previously unsatisfied freight - - - - - **813**
See COMPANY. 2.

—— Income tax—Single ship company—Average of three years preceding year of assessment—Trade first set up within period of three years - - - - **923**
See REVENUE. 2.

—— Representative action—Action by shippers of goods on a general ship on behalf of themselves and other shippers of goods in the same ship - - - - **1021**
See PRACTICE. 4.

—— Wharfinger, Limits of liability of—Carriage of goods by lighter from ship to warehouse - - - - - - **395**
See WHARFINGER.

—— Workmen's compensation—Seaman returning to ship - - - - - **555**
See EMPLOYER AND WORKMAN. 8.

SOLICITOR — *Authority of Solicitor to compromise Action—Apparent Assent but Misunderstanding in Fact on Part of Client as to Terms of Compromise—Practice.*

If a client by his conduct induces his solicitor to believe that he is authorized to make a certain compromise in an action which the solicitor is conducting on behalf of the client, and the solicitor, reasonably relying on that conduct and believing that he has the authority of the client, makes the compromise, the client is bound whether he intended to give that authority or not and whether he in fact understood or did not understand the terms of the compromise.

Before a county court action was tried a settlement was arrived at between the solicitors for the respective parties and a memorandum embodying its terms was signed by the solicitors. This memorandum was not read by the defendant, but it was read over to her by her solicitor or his son, and she seemed to assent to its terms.

SOLICITOR—*continued.*

The action was thereupon, by consent of the county court judge and the solicitors on both sides, struck out. Although the defendant seemed to assent to the terms of the compromise she did not in fact understand them and did not mean to assent to them. Subsequently an agreement in writing, signed by the solicitors for both parties, containing the terms of the memorandum was sent to the defendant, who repudiated it upon the ground that the terms of the compromise which she authorized her solicitor to effect were not contained either in the memorandum or in the written agreement :—

Held, that the defendant was bound by her solicitor and was liable in damages for the breach of it. LITTLE *v.* SPREADBURY - - - - - - **C. A. 658**

2. —— *Undertaking to pay Money to Person not Client—No Misconduct on Part of Solicitor nor Legal Proceedings pending — Disciplinary Jurisdiction of Court — Summary Order for Payment.*

The Court has jurisdiction, on the application by a person to whom a solicitor gives an undertaking in his capacity as a solicitor, to exercise its summary procedure to compel the solicitor to carry out the undertaking, even though the applicant is not the client of the solicitor and the undertaking was not given in the course of legal proceedings, and there is no suggestion of dishonourable or discreditable conduct on the part of the solicitor.

Peart v. *Bushell*, (1827) 2 Sim. 38, and dictum of A. T. Lawrence J. in *In re a Solicitor, Ex parte Hales*, [1907] 2 K. B. 539, not followed. UNITED MINING AND FINANCE CORPORATION, LIMITED *v.* BECHER - - **Hamilton J. 296**

——Bankruptcy—Taxation—Trustee's solicitor's bill of costs—Notice of taxation not given to new trustee - - - **346**
See BANKRUPTCY. 1.

—— Costs—Taxation—Delivery of bill of costs—Default—Motion for attachment **9**
See PRACTICE. 1.

SPORTING RIGHTS — Occupier with—Ground game — Prohibition against setting spring traps except in rabbit holes **465**
See GAME.

SPRING TRAPS.
See under GAME.

STATUTES :—

16 Car. 1, c. 10, ss. 6, 8 - - - - - **576**
See HABEAS CORPUS. 2.

1677.

29 Car. 2, c. 3, s. 4—*Statute of Frauds* **522, 531, 776**
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TRAMWAYS—*Negligence—Lease of Tramway—Lessor to execute Repairs at Cost of Lessee—Contract for Repairs by Lessor with Contractor—Lessee not Party to Contract—Negligence by Contractor in executing Repairs—Accident to Tramcar—Liability of Contractor to Lessee—Damages—Compensation paid to Passengers—Right of Lessee to recover from Contractor.*

The corporation of a borough were the owners of a tramway in the borough, and they granted a lease of the tramway, of which lease the plaintiffs were the assignees. Under the lease the repairs necessary to keep the tramway in working order were to be executed by the corporation at the cost of the plaintiffs. During the currency of the lease the tramway required to be relaid at a certain place, and an agreement was entered into between the corporation and the plaintiffs which, after reciting that the corporation at the request and with the consent of the plaintiffs had agreed to relay the tramway, provided that the corporation would relay the tramway, and would during the execution of the work provide where necessary a temporary track for the purpose of enabling the plaintiffs, as far as possible, to maintain their service of trams, and the agreement further provided that nothing therein contained should render the corporation liable in the event of any accident, injury, or damage being occasioned to or sustained by the plaintiffs, their servants or passengers, or their rolling stock, through or arising out of the execution by the corporation of the work, but that the corporation would insert in the contract to be entered into by them a provision imposing upon the contractor full responsibility for all claims and demands resulting from any such accident, injury, or damage. The corporation thereupon made a contract with the defendant, to which the plaintiffs were not parties, which recited the lease and that the corporation had at the request and with the consent of the plaintiffs, subject to certain conditions, agreed to relay the tramway, and by which the defendant agreed to execute the work of relaying the tramway and to indemnify the corporation against all actions and claims for compensation to workmen and passengers carried on the tramway arising out of the execution of the work, and that the defendant should, during the execution of the work, be responsible for all accidents. During the execution of the work the tramcars continued to run, and a car which was carrying passengers was derailed and overturned owing to the negligent manner in which certain of the work was being carried out at the place where the accident happened, and the passengers and driver were injured, and the tramcar was damaged. The plaintiffs paid compensation to the passengers and driver, and claimed to recover from the defendant the amounts so paid and the cost of repairing the tramcar :—

Held, that, though the plaintiffs were not parties to the contract between the corporation and the defendant, inasmuch as the plaintiffs' proprietary rights as lessees of the tramway and their right of passage on the highway had been injuriously affected by the act of the defendant, the latter was liable in damages to the plaintiffs; and that, as the work of relaying the tramway while the tramcars were running involved risk of danger to the passengers in the tramcars, the plaintiffs were liable to their passengers, and were entitled to recover from the defendant the sums properly paid as compensation to the passengers who were injured, as well as the sum paid as compensation to the driver and the cost of repairing the tramcar. CITY OF BIRMINGHAM TRAMWAYS COMPANY *v.* LAW
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—— Insurance (Marine)—Policy—Warranty—Understanding amongst underwriters *See* INSURANCE (MARINE). **145**

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WATER—*Waterworks—Water Rate payable by Owner—Prohibition against cutting off Tenant's Water Supply—Recovery of Water Rate from "Owner"—Receiver of Rents—Water Companies (Regulation of Powers) Act*, 1887 (50 & 51 *Vict. c.* 21), *s.* 4—*Waterworks Clauses Act*, 1847 (10 *Vict. c.* 17), *ss.* 3, 72.

By a special Act of a water company it was provided that "The owners of all houses or parts of houses occupied as separate tenements and not respectively exceeding the annual value of 20*l.* shall during such time as they are supplied with water by the company be liable to the payment of the rates chargeable in respect thereof under this Act instead of the occupiers thereof; and the person receiving the rent of any such house or tenement from the occupier thereof on his own account or as agent or receiver for any person interested therein shall for that purpose be deemed the owner of such house or tenement." The special Act incorporated the Waterworks Clauses Act, 1847, by s. 3 of which "The expression 'water rate' shall include any rent reward or payment to be made to the undertakers for a supply of water."

By s. 4 of the Water Companies (Regulation of Powers) Act, 1887, "Where the owner and not the occupier is liable by law or by agreement with the water company to the payment of the water rate in respect of any dwelling-house or part of a dwelling-house occupied as a separate tenement, no water company shall cut off the water supply for non-payment of the water rate, but such water rate, without prejudice to the other remedies of the company for enforcing payment thereof from such owner, shall . . . . be a charge on such dwelling-house in priority to all other charges affecting the premises; and (without prejudice to such charge) the amount may be recovered . . . . from the owner or from the occupier for the time being in the same manner as water rates may by law be recovered."

The owner of a block of flats, which were respectively of an annual value not exceeding 20*l.*, entered into an agreement with a water company for the supply of water to the flats by meter. The owner subsequently mortgaged the premises, and upon his getting into financial difficulties the mortgagees appointed the defendant to act as receiver of the rents of the flats on their behalf. At the date of the defendant's appointment there were arrears owing to the plaintiffs (the successors of the water company) for water supplied to the flats under the agreement:—

Held, that the defendant was not the owner of the premises within the meaning of s. 4 of the Water Companies (Regulation of Powers) Act, 1887, and was not liable as such for the arrears existing at the date of his appointment. METROPOLITAN WATER BOARD *v.* BROOKS **Channell J. 134**

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—— Water rate—Domestic purposes—Railway station—Sanitary conveniences - **890** *See* RATES. 2.

WATER BAILIFF—Powers of—Right to search suspected person's pocket - - **320** *See* FISHERY ACTS.

WHARFINGER—*Carriage of Goods by Lighter from Ship to Warehouse—Limits of Liability of Wharfinger.*

Wharfingers who, as incidental to their business as wharfingers, transport goods for their customers by lighter from the importing ships to their warehouse, but do not hold themselves out as ready to carry goods for any other persons, are not in respect of that transport subject to the common law liability of common carriers, but are liable only for negligence. CONSOLIDATED TEA AND LANDS COMPANY *v.* OLIVER'S WHARF - - - - - **Hamilton J. 395**

WILD BIRDS—*Live Larks recently taken—Prohibition against "killing or taking" Larks in County of London—Possession of Larks lawfully taken in another County—Wild Birds Protection Acts*, 1880 (43 & 44 *Vict. c.* 35), *ss.* 3, 8, *and* 1881 (44 & 45 *Vict. c.* 51, *s.* 1)—*Wild Birds Protection (Administrative County of London) Order*, 1909, *art.* 4.

By s. 3 of the Wild Birds Protection Act, 1880, any person who between March 1 and August 1 in any year shall knowingly and wilfully shoot or attempt to shoot, or shall use any boat for the purpose of shooting or causing to be shot, any wild bird, or shall use any lime, trap, snare, net, or other instrument for the purpose of taking any wild bird, or shall expose or offer for sale or shall have in his control or possession after March 15 any wild bird recently killed or taken, shall be liable to a penalty. By s. 8, a Secretary of State may "by order extend or vary the time (in any county) during which the killing and taking of wild birds or any of them is prohibited by this Act." By s. 1 of the Wild Birds Protection Act, 1881, a person shall not be liable to be convicted under s. 3 of the Act of 1880 of exposing or offering for sale, or having the control or possession of, any wild bird recently killed, if he satisfies the Court that the killing of the wild bird, if in a place to which the Act extends, was lawful at the time when and by the person by whom it was killed, or that the wild bird was killed in some place to which the Act does not extend.

A Secretary of State made an order under s. 8 of the Act of 1880, applicable to the county of London, extending the time during which the "killing or taking" of certain wild birds, including larks, was prohibited to the whole of the year:—

Held, that the words "killing and taking" in s. 8 of the Act of 1880 include all the offences specified in s. 3, and that therefore, by virtue of the order, it is made an offence for a person to have in his possession or control in the county of London at any time of the year live larks which have been recently taken, though they may have been taken in a place where it is lawful to take them. FLOWER *v.* WATTS - - **Div. Ct. 327**

WILD BIRDS PROTECTION (ADMINISTRATIVE COUNTY OF LONDON) ORDER, 1909, art. 4 - - - - 327
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WORDS—"Agricultural locomotive" - 323
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—— "Contract of service" - - - 336
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—— "Owner" - - - - - - 134
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—— "Parent" - - - - - - 559
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—— "Workman" - - - - - 336
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